77-1575

No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

MIDWEST VIDEO CORPORATION, ET AL.

PETITIONER'S APPENDIX

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INDEX TO APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1496

MIDWEST VIDEO CORPORATION, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
INTERVENORS.

No. 76-1839

AMERICAN CIVIL LIBERTIES UNION, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
INTERVENORS.

On Petition for Review of an Order
of the Federal Communications Commission

Submitted: September 12, 1977
Filed: February 21, 1978

Before STEPHENSON, Circuit Judge, WEBSTER, Circuit Judge, and MARKEY, Chief Judge.*

MARKEY, Chief Judge.

Petitioners, Midwest Video Corporation (Midwest) and the American Civil Liberties Union (ACLU), seek review of the Federal Communications Commission's (Commission's) *Report and Order in Docket No. 20508*, 59 F.C.C.2d 294 (released May 13, 1976), *reconsideration denied*, 62 F.C.C.2d 399 (released December 21, 1976) (*1976 Report*) [1] imposing mandatory access and channel capacity requirements upon certain cable television systems.[2]

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1] The *1976 Report* modifies and replaces earlier regulations on mandatory access and channel capacity, *Cable Television Report and Order*, 36 F.C.C.2d 143, *affirmed on reconsideration*, 36 F.C.C.2d 326 (1972) (*Cable Report*). Our holding, that the access rules of the *1976 Report* exceed the jurisdiction of the Commission, carries with it the substantially identical, though more onerous, rules of the *Cable Report*.

[2] Community-wide, coaxial cable television systems were earlier called "Community Antenna Television" or "CATV" systems. The Commission now uses the more inclusive "cable television," *Cable Report*, as do we. *See* 47 C.F.R. § 76.5(a) (1976).

Midwest challenges the regulations as (1) inadequately supported by the record, (2) beyond the jurisdiction of the Commission, (3) violative of the free speech clause of the First Amendment, and (4) violative of the due process clause of the Fifth Amendment.

ACLU does not challenge the Commission's jurisdiction to issue the *1976 Report* regulations, but objects to the softening modifications made to the 1972 *Cable Report* access rules,[3] alleging that the modifications (a) lack rational basis in their failure to consider interests of access program producers, (b) violate the Commission's mandate to regulate cable television as a common carrier, and (c) do not fully achieve general First Amendment goals.[4]

We grant the petition for review and set aside the order because it exceeds the jurisdiction of the Commission.

Background

As the cable television industry sought to develop over the past twenty-five years, the Commission's

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[3] *See* note 1 *supra*.

[4] Briefs *Amicus Curiae* or as Intervenors were filed by National Cable Television Association, Inc.; Teleprompter Corporation; National Black Media Coalition, Citizens For Cable Awareness in Pennsylvania, and Philadelphia Community Cable Coalition, jointly; and Coldwater Cablevision Incorporated and Michigan CA-TV Company, jointly.

effort to regulate it has led to numerous Commission proceedings, voluminous litigation, and substantial literature.[5]

A cable system is composed of an antenna, to pick up local and distant broadcast signals, and cables for transmitting those signals to the home television sets of the system's paying subscribers. Some systems have employed the services of microwave companies for long distances between their antennae. The cable system may also transmit its own programs, *i.e.*, "cablecast," through its cables to its subscribers. For technical reasons, most cable systems began with 12 channels.[6]

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[5] Of the extensive commentary, these are representative: Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 Va. L. Rev. 515 (1975); Bretz, *Public Access Cable TV: Audiences*, J. of Com., Summer 1975 at 15; Doty, *Public Access Cable TV: Who Cares*, J. of Com., Summer 1975 at 23; Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 Va. L. Rev. 541 (1975); Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 Fordham L. Rev. 25 (1973); S. Rivkin, Cable Television: A Guide to Federal Regulations (1973); Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 Vand. L. Rev. 681 (1972); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J. Law & Econ. 207 (1972); Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 Bell J. Econ. & Mtg. Sci. 98 (1972); R. Smith, The Wired Nation: Cable TV: The Electronic Communications Highway (1972); Sloan Commission on Cable Communications, On the Cable: The Television of Abundance (1971); Note, *The Wire Mire: The FCC and CATV*, 79 Harv. L. Rev. 366 (1965).

[6] The 12 channels are in the "low band" and "high band" portions of the MHz spectrum. The 20 channel capacity requirement in the *1976 Report* necessitates use of the "mid-band," and a concomitant expense of construction and rebuilding.

Technophiles say that present technology enables installation of as many as 80 channels, and that the advent of laser-ray carriage of television signals, with virtually unlimited channels, may replace cable. *See* Field, *Laser Video Is Intriguing, But Is It Useful?* N.Y. Times, Sept. 18, 1972, at 37, col. 3.

Having decided to preserve the "national television service" as it existed in 1952, *Sixth Report and Order on Rules Governing Television Broadcast Stations*, 17 Fed. Reg. 3905 (1952), the Commission initially ignored cable television, considering it no threat to broadcasting or to its regulatory domain. On receipt of broadcaster complaints in 1958, the Commission ruled that cable systems were not common carriers and refused to regulate them. *Frontier Broadcasting Co.*, 24 F.C.C. 251, 253-54 (1968), *aff'd, Report and Order on Inquiry Into the Impact of Community Antenna Systems, Television Translators, Television "Satellite" Stations, and Television "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 441 (1959). The Commission's position that cable systems were not engaged in common carrier operations was upheld in *WSTV, Inc.*, 23 Rad. Reg. (P-H) ¶ 184 (1962) and in *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F.2d 282, 284, (D.C. Cir. 1966). In all this, the Commission decided that it had no jurisdiction over cable television as common carriers under Title II of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (1970) (Act),

or as broadcasters under Title III of the Act, and that it had no plenary power to regulate an industry just because that industry may have an impact on broadcasting, over which it did have jurisdiction.[7]

Becoming persuaded, and announcing with admirable candor, that cable systems might represent a competitive threat to its regulatees in television broadcasting, the Commission decided to assert jurisdiction.[8] The Commission's approach to Congress for appropriate statutory authority was frustrated. To date, the Congress has refrained from exercising its legislative authority to provide that

[7] The Commission candidly and repeatedly admitted an inability to determine the *fact* of adverse impact, *Report and Order on Inquiry, supra,* 26 F.C.C. at 421-22, 424, 436; *First Report and Order on Grant of Authorizations in the Business of Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems,* 38 F.C.C. 683, 710-11 (1965), and *Second Report and Order on Grant * * * Antenna Systems,* 2 F.C.C.2d 725, 773, 781 (1966). Yet the Commission refused a request for an experiment to test impact, *Suburban Cable TV Co.,* 9 F.C.C.2d 1013 (1967).

[8] Whether agencies become captives of their regulatees, and whether the "barter process" before agencies must be accepted in place of "ideal" rulemaking, *see* Jaffe, *The Illusion of the Ideal Administration,* 86 Harv. L. Rev. 1183 (1973), and whether, to use an imperfect analogy, the motion picture industry could have advanced as rapidly against vaudeville under a Federal Entertainment Commission, or the airlines as rapidly under a Federal Transportation Commission regulating railroads and airlines, the wisdom and implications to social progress of a regulatory system that enlists the power of government to preserve established industry against new technological competition, as distinguished from reliance on consumer preference at a perceived risk of market chaos, is a matter for the Congress, not the courts.

the Commission shall or shall not regulate cable systems, and, if they shall, in what manner and to what purpose and extent. The subject of cable regulations has thus been left substantially entirely to the Commission and the Courts.[9]

Proceeding on its own, the Commission has attempted not just to keep pace, but to anticipate the course of communications advances, facing the virtually impossible task of outrunning our modern technological juggernaut. Beginning with indirect regulation through its jurisdiction over microwave companies used by some cable systems, and exhibiting an apparent hostility toward letting cable grow as its own ingenuity and consumer acceptance may have dictated, the Commission imposed an extended "freeze" on cable's growth, *see Wentronics, Inc.* v. *FCC,* 331 F.2d 782 (D.C. Cir. 1964).

The Commission has since attempted to frame a place for cable television while preserving broadcast television intact. The effort has resulted in the establishment of a Cable Television Bureau under the

[9] A bill giving the Commission full licensing authority over cable television failed on the Senate floor. S. 2653 S. Rep. No. 923, 86th Cong., 1st Sess. (1959). The Commission's own legislation was introduced in 1961. S. 1044 and H.R. 6840, 87th Cong. 1st Sess. (1961). Congress took no legislative action. The matter was again considered in 1965 and 1966. Hearings on H.R. 7715 Before the Subcomm. on Communications and Power of the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess. (1965); Hearings on H.R. 12914, H.R. 13286, and H.R. 14201 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. (1966).

Commission, and 60 pages of cable regulations at 47 C.F.R. §§ 76.1-78.115 (1976).[10] As a substitute for the license it is statutorily empowered to grant or refuse to broadcasters, the Commission issues a "Certificate of Compliance," for cable operators. 47 C.F.R. § 76.11. It sets for state and local franchising authorities the conditions they may impose on cable enterprises seeking a franchise to string cable underground or on poles. 47 C.F.R. § 76.31. It requires cable operators to submit forms and reports. 47 C.F.R. §§ 76.401-411.

Much of the Commission's cable-regulating has involved the planting of new and dramatic seeds of regulation, based on soaring, euphoric predictions (some from cable owners) of great things to come from cable television, seeds which had to be plowed under, when germination failed in the bright sunlight of commercial, economic, and technological reality.[11]

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[10] Cable owners may welcome the Commission, as regulator-protector-servant. Dealing *en masse* with the Commission, which dictates to local franchising authorities, 47 C.F.R. § 76.258, may be easier than facing those authorities one-on-one; the Chief of the Cable Television Bureau desired to regulate pay movies in hotel rooms as competitors to cable television. *12 Weekly TV Digest*, Oct. 16, 1972 at 2. Cable and broadcast industries may one day require "protection" against the threat that direct satellite-to-home television will replace both.

[11] For more detailed discussion of: (1) the potential technological capacities of cable telecommunications; (2) the Commission's initial declination of jurisdiction; (3) its later, growing effort to regulate; (4) its changes in justification, from

The Commission's jurisdiction over cable retransmission of distant (Los Angeles) broadcast television signals into a local (San Diego) broadcast station's "contour" was upheld as "reasonably ancillary" to its regulatory responsibilities for broadcast television in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). In the following year, the Commission adopted a "mandatory origination" rule, requiring cable systems with over 3499 subscribers to originate some programs of their own. *First Report and Order in Docket No. 18397*, 20 F.C.C. 201, 202-04 (1969). This court set that rule aside as beyond the Commission's jurisdiction. *Midwest Video Corp.* v. *United States*, 441 F.2d 1322 (8th Cir. 1971). In a split decision, the Supreme Court reversed, sustaining the mandatory origination rule as also "reasonably ancillary" to the Commission's responsibilities for broadcast television. *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).[12]

Having carried the fight to victory in the Supreme Court, the Commission never enforced its mandatory

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protection of local VHF broadcasting stations, to fostering of UHF growth, to a fight against "unfair competition;" (5) the utopian forecasts of cable's potential, and ensuing disappointments; and (6) the oft-repeated pattern of regulations withdrawn, waivered, and abandoned, see the literature listed in note 5, *supra*, particularly Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 Fordham L. Rev. 25 (1973), and Price, *Requiem For the Wired Nation: Cable Rulemaking at FCC*, 61 Va. L. Rev. 541 (1975).

[12] Four Justices joined a plurality opinion; four dissented. The Chief Justice concurred in the result.

origination rule.[13] Instead, it conducted new proceedings, leading to the 1972 *Cable Report*, imposing "mandatory access" rules, under which cable systems in the largest 100 markets, were required, *inter alia*, to build a 20-channel capacity, to reserve three "access" channels for free use by public, educational, and governmental bodies, and to reserve a fourth channel for leased access. 36 F.C.C.2d at 240-41. All access was to be on a first come, nondiscriminatory basis, with no control by cable operators over program content. A compliance deadline of March 31, 1977 was set.[14]

In 1974, the Commission formally rescinded the mandatory origination rule, 39 Fed. Reg. 43302, and simultaneously issued rules on equipment availability, *Report and Order in Docket No. 19988*, 49 F.C.C.2d

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[13] In *Midwest Video, supra,* 441 F.2d at 1328, this court said it was "highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest." In reversing, the plurality considered that holding "patently incorrect" 406 U.S. at 671.

[14] Midwest was not operating in one of the top 100 markets and its standing to challenge these rules would have been doubtful. *See Midwest Video Corp.* v. *United States, supra,* 441 F.2d at 1328. ACLU complained of the Commission's failure (1) to impose common carrier obligations, and (2) to limit cable owners to one channel. The Ninth Circuit denied ACLU's petition for review. *American Civil Liberties Union* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975). The Commission emphasizes here a phrase of the opinion in that case as indicating judicial approval of its access rules, but there was no challenge to its jurisdiction to issue its access rules before that court.

1090 (1974), requiring cable systems with over 3499 subscribers to purchase, and make available to the public, equipment for producing local programs and cable time for their presentation. Midwest petitioned this court for review but withdrew its petition as moot in view of the challenge here to the *1976 Report*, which merged the equipment availability and mandatory access rules. *Midwest Video Corp.* v. *FCC*, No. 75-1671, *dismissed on petitioner's motion* (8th Cir. April 12, 1976).

In March, 1974, the Commission appointed task forces to investigate the effect of the 1972 *Cable Report* rules. In responding to the task forces' report, the Commission invited comment on postponement of the March 31, 1977 deadline, *Notice of Proposed Rulemaking in Docket No. 20363*, FCC 75-211, 51 F.C.C.2d 519 (Released Feb. 26, 1975), and acknowledged concerns of various parties that: (1) industry revenues were insufficient to create new plants, distribution networks, amplifiers, converters, and modulators; (2) more time was needed to build revenue; (3) the poor economy and large debt of most cable systems meant they were unable to borrow for non-revenue producing activities; and (4) the Commission was unreasonable in expecting financial interests to provide capital while it required franchise authorities to enforce access and equipment rules, a process entailing the cable system's very authority to operate. The Commission received estimates that the cost of rebuilding to meet the 1972 rules was between $133 million and $430 million.

In its *Notice of Proposed Rulemaking in Docket No. 20508*, 53 F.C.C.2d 782, 784 (Released June 27, 1975), the Commission added to deadline postponement consideration of alternative methods by which "we might reaffirm our commitment to access cablecasting while recognizing the economic realities of today's marketplace." It noted the substantial cost of technological changes required by its 1972 access rules and great variances in the burden on different cable systems.

In its *Notice* in Docket No. 20508, *supra*, the Commission rejected all suggestions that it require construction of channel capacity and provision of access only upon indication of community demand for such services. The suggesters felt that in many communities the channels and equipment would go unused, yet the cost would be borne by cable consumers ("subscribers") totally uninterested in viewing access programs. The Commission said, "[W]hile we may consider this approach at some point in the future, we do not believe for the following reasons that the general adoption of an approach strictly tied to demand would at this time be wise." [15] The Commission listed ten "reasons": (1) cable television is new and evolving; (2) availability [16] of cable channels for dissemination of in-

[15] How adoption of a demand-governed approach *after* construction could save the construction costs was not explained.

[16] Of course access channels were not actually "available" on most systems, hence the Commission's felt need to order their construction.

formation is even newer; (3) demand for access services is a function of community awareness of their existence; (4) awareness and full utilization of cable's potential requires time; (5) some older systems have provided minimal access on a voluntary basis or no access; (6) in those communities awareness has not had opportunity or time to develop; (7) if its requirements resulted in blank channels, it believed that would shorten the time to realize the full potential for access services, because blank channels are visible and continuing inducements to be filled; (8) it considered that true for the channel user and the system operator; (9) if it required the system operator to provide access channels, he could be expected to encourage their use; (10) if it now altered its rules to reflect existing demand for access services, it would raise a barrier to growth of that demand and a disincentive to new services "we expect of cable." 53 F.C.C.2d at 787, 788.

Though the Commission said "There is mounting evidence that access cablecasting in an increasing number of communities is beginning to fill that need," Commissioner Robinson stated, "If the commission has such evidence they have kept it remarkably well hidden from me." 53 F.C.C.2d at 801.

Commissioner Quello suggested deference to local franchise authorities, who might require one access channel "upon demand and need therefore," and called on the Commission to obtain "practical, statistical data on current uses of cable facilities" and to project the future based "on statistical data rather

than 'blue sky' expectations as in the past," saying, "In short, I think the Commission has burdened the cable industry unnecessarily with requirements and restrictions which cannot be statistically or practically supported." 53 F.C.C.2d at 799.

On May 13, 1976, having invited and received comments, the Commission released its *Report and Order in Docket 20508*, the *1976 Report* here under review.

The *1976 Report* rescinded earlier requirements based on assumptions admittedly proven false, and made three major changes in the 1972 mandatory [17]

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[17] We deal here only with *mandatory* access. Nothing in present law or in this opinion precludes a cable system operator from voluntarily providing public access.

Moreover, the present case involves only the jurisdiction of the Commission to issue its Federal access and equipment rules. The only direct effect of our opinion on the election of local franchising authorities, to require or waive access requirements in the light of community need and interests, is to free those authorities from the Commission's restrictions, found in 59 F.C.C.2d at 324-25. 47 C.F.R. § 76.258.

The Commission mis-relies on the presumed right of franchising authorities to condition local franchises on provision of access channels as justification for its doing so. The Commission's jurisdiction must come from Congress, not from local authorities.

ACLU implies the demise of all public access if mandatory access rules are not upheld. Nothing of record so indicates. Conjecture could equally invisage voluntary continuation and expansion of existing access programs. In all events, the Commission's jurisdiction is not expandable through application of unauthorized regulations, nor can application convert unauthorized regulations into authorized regulations, over the short term and prior to direct court challenge.

Though ACLU argues that mandatory access must be continued to protect the "investment" of present access users, no one can be said to have reasonably relied on, or established an equity in continuation of, Commission cable regulations which have been consistently and continually revised, unenforced, withdrawn, waivered, and abandoned. Nor may vested interests be normally acquired in continuation of regulations exceeding *ab initio* the jurisdiction of the issuing agency.

access rules. First, it applied them to all cable systems with over 3499 subscribers, eliminating the top 100 markets criteria. 59 F.C.C.2d at 303-06; 47 C.F.R § 76.252-56 (1976). Second, it extended the March 31, 1977, deadline for compliance with the 20-channel construction requirement to June 21, 1986, for most, but not all, existing systems. 59 F.C.C.2d at 321-24; 47 C.F.R. § 76.252(b) (1976).[18] Third, it required four access channels only of systems having sufficient capacity and demand for full time access, requiring other systems to conglomerate access on one or more channels. 59 F.C.C.2d at 314-16; 47 C.F.R. § 76.254 (1976).

Thus an evolutionary process has led to the Commission action under review, the *1976 Report*, which provides:

> (1) that operators of cable systems having 3500 or more subscribers designate at least four channels for access users, one channel each for public access, education access, local government access, and leased access. 47 C.F.R. § 76.254(a).

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[18] The March 31, 1977 deadline was previously cancelled in *Report and Order in Docket No. 20363*, 54 F.C.C.2d 207 (1975). Petition for review is pending in *National Black Media Coalition* v. *FCC*, D.C. Cir. Appeal No. 75-1792, a case held in abeyance pending outcome of these consolidated cases.

(2) that, until demand exists for full time use of all four access channels, access programming may be combined on one or more channels. 47 C.F.R. § 76.254(b).

(3) that at least one full channel for shared access be provided, but if a system had insufficient activated channel capacity on June 21, 1976, it could provide whatever portions of channels are available for such purposes. 47 C.F.R. § 76.254(c).

(4) that at least one public access channel be forever supplied without charge. 47 C.F.R. § 76.256(c)(2).

(5) that a reasonable charge for production costs may be charged for live studio programs longer than five minutes. 47 C.F.R. § 76.256(c)(3).

(6) that operators establish rules providing for access on a first-come, nondiscriminatory basis and prohibiting the transmission of lottery information, obscene or indecent matter, and commercial and political advertising. 47 C.F.R. § 76.256(d)(1) (on public channel). 47 C.F.R. § 76.256 (d)(2) (on educational channels).[19]

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[19] In its *Clarification of Section 76.256 of the Commission's Rules and Regulations*, 59 F.C.C.2d 984, 986 (1976), the Commission amended these regulations to provide that cable operators *enforce* the rules which they are required to establish against obscenity and indecency.

In *American Civil Liberties Union* v. *FCC*, No. 76-1695 (D.C. Cir.), ACLU has challenged the rules found at 47 C.F.R. § 76.256(d)(1)-(3) as unconstitutionally imposing a prior censorship obligation on cable operators. Upon an order of the court in that pending case, issued August 26, 1977, 47 C.F.R. § 76.256(d)(1)-(3) has been stayed to the extent that it prohibits the presentation of obscene or indecent matter pending the conclusion of proceedings upon remand to the Commission. However, the Commission may decide not to repeal this provision. Thus, to prevent multiple remands, we view this provision as before us as part of the *1976 Report* as clarified. 59 F.C.C.2d 984.

(7) that cable operators exercise no other control over content of access programs. 47 C.F.R. § 76.256(b).

(8) that educational and local government access be offered without charge for the first five years. 47 C.F.R. § 76.256(c)(1).

(9) that operators establish rules for leased access channels on a first-come, nondiscriminatory basis, requiring sponsorship identification and an appropriate rate schedule, with no control over program content except to prohibit lottery information and obscene or indecent material. 47 C.F.R. § 76.256(d)(3).

(10) that each cable supply equipment and facilities for local production and presentation of access and lease programs. 47 C.F.R. § 76.256(a).[20]

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[20] The Commission interpreted this rule as requiring equipment availability beyond normal business hours, *Reconsideration of Report and Order in Docket No. 20508*, 62 F.C.C.2d 399, 406 (1976), and as not permitting a charge for use of automated services to play tapes and films, *id.* at 407, even if the playing runs longer than five minutes.

The Commission requires cable operators to permit the installation of converters by third parties who wish to use the operators' facilities and who will pass the cost of converters

(11) that equipment in new cable systems have a capacity of two-way, nonvoice communication and a minimum of 20 channels. 47 C.F.R. § 76.252(a).[21]

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to subscribers desiring to view the program of the third party. It also insists that cable operators with limited capacity defer their own programming in favor of access users. "We shall scrutinize the actions of operators who, while providing their own programming, assert that their activated capability is insufficient to permit the leasing of a channel to potential competitors." *1976 Report* at 316. The Commission believes that time and weather channels, though of "substantial benefit to subscribers," should also give way to access programs. *Id.* at 316 n.19. If only one channel is available for use by access seekers, the cable operator will be in "bad faith" if he uses that channel for pay programming. *Id.* at 317.

[21] Jurisdiction to require minimum channel capacity and two-way capacity has not been argued separately from the mandatory access requirement. Channel capacity is apparently necessary to provide access channels. The Commission has linked two-way capacity with the 20-channel requirement in the same regulation, apparently because the cost is lower if such capacity be added when the 20 channels are built. The relationship of mandatory access to a two-way capacity requirement is not as clear as that of the 20-channel requirement, but to the extent that two-way capacity relates to the "access concept" or that two-way capacity cannot be separated from the 20-channel requirement, it must fall with the 20-channel and other regulations of the *1976 Report*. If cable systems *offer* two-way communications services, those services may be subject to regulation in accord with their nature, which is distinct from that of program distribution services affected by access requirements.

In adopting its two-way capacity requirement, the Commission recognized that it could not preempt state or local regulation of intra-state, two-way, non-video communications, citing *Nat'l Ass'n of Reg. Util. Comm'rs* v. *FCC*, 533 F.2d 601 (D.C. Cir. 1976). The Commission interpreted that decision narrowly, stating that it did not foreclose authority to order

(12) that cable systems in operation within a major television market before March 31, 1972, and other systems in operation before March 31, 1977, shall have ten years from the effective date (June 21, 1976) of the *1976 Report* to comply. 47 C.F.R. § 76.252(b).

Issue

The dispositive issue is whether the regulations promulgated in the *1976 Report* exceed the Commission's jurisdiction.[22]

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two-way capacity, and that some functions of that capacity relate to broadcast program distribution. 59 F.C.C.2d at 310-11.

In broadcast television, British viewers may acquire the "teletext" device, enabling them to call up on their sets data blocks (100 magazine pages) in which the desired information can be found, or the "viewdata" system, employing telephone lines, for calling up on their sets the specific information desired. *British Hook Up TV To Printed Magazine*, Washington Post, Dec. 25, 1977, at D4. Whether the Commission has considered any requirement for "two way capacity" on broadcast television is not of record.

Two-way capacity service may well acquire consumer interest and demand. *See, e.g., Columbus Folk Can Talk Back When TVs Become Annoying*, The Cincinnati Enquirer, Dec. 1, 1977, at A-6.

[22] Because we hold the regulations under review to have gone too far, it is unnecessary to discuss at length all other contentions raised by Midwest, *amici curiae*, and intervenors, or to treat ACLU's contention that the regulations did not go far enough.

OPINION

I Jurisdiction

The mandatory access, channel capacity, and equipment regulations of the *1976 Report* exceed the Commission's jurisdiction because: (1) the statute provides no jurisdiction; (2) the regulations are not "reasonably ancillary" to the Commission's responsibilities for regulation of broadcast television; (3) objectives do not confer jurisdiction; (4) the Commission's ends do not justify its means; (5) the means are forbidden within the Commission's statutory jurisdiction.

(1) *The Statute and the Commission's Jurisdiction Over Cable Television*

The Commission's charter, its basic grant of power to regulate, is the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1970) (Act), in which Congress delegated regulatory authority over (1) common carriers of communications by wire or radio, Title II, 47 U.S.C. §§ 201-21 (1970), and (2) broadcasters using channels of radio transmission, Title III, 47 U.S.C. §§ 301-29 (1970). Because § 3(b) includes "transmission by radio of * * * pictures * * *," 47 U.S.C. § 153(b) (1970), the Act encompasses broadcast television. Cable systems, first developed in the 1950's, are neither common carriers nor broadcasters.[23] Hence the Act contains

[23] In its *1976 Report* and elsewhere, the Commission has recognized that cable systems are neither common carriers nor broadcasters, but has justified its rules by labelling cable systems as a "hybrid" of both, without explanation of how a system, when it does not offer a service of transmitting the communications of others, incorporates any aspect of "common" carriage, or how a system that employs no frequency of the broadcast spectrum to cablecast, and that sends its transmissions only to its own specific subscribers and not into the airwaves, incorporates any aspect of "broadcasting." The operative fact would appear to be that cable systems, because they retransmit broadcast programs, and because their subscribes may also receive over-the-air broadcast programs, may affect the broadcast television industry. Whether that effect be viewed as a competitive threat to broadcasters, as detrimental to conventional television service to the public, or as impeding the legitimate statutory goals of the Act, the Commission has deemed it necessary, in the absence of Congressional guidance, to devote a major effort over recent years to attempted regulation of cable television.

no specific grant of authority over cable systems, and there can have been no Congressional intent regarding them.

Whether the Commission and the courts should relieve Congress of the need to revise statutes in the light of new technology, *General Telephone Co. of Cal.* v. *FCC*, 413 F.2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969),[24] neither the nonexistence of cable technology in 1934, nor Congressional abstention over the past quarter century, need be

[24] Concerning the new satellite communication technology, Congress appears to have had little difficulty in adopting appropriate legislation, *i.e.*, the Communications Satellite Act of 1962, 47 U.S.C. §§ 701-44 (1970). Further, when Congress has wished to include cable systems in a provision of the Act, it has done so. 47 U.S.C. § 314 (1970), *as amended by* Act of Oct. 15, 1974, Pub. L. No. 93-443, Titles II, IV, §§ 205(b), 403, 88 Stat. 1278, 1291.

considered the sole reason for the present absence of specific, plenary statutory power to regulate the industry called "Cable Television." Neither the basic rationale for regulation of common carriers (to insure fair and equal access to the carrier's service) nor that for regulation of broadcast transmissions (to preclude bedlam on broadcast frequencies), is applicable to cable systems *per se*.

Congressional silence does not, however, end the inquiry in every case. Though a statutory void cannot itself create jurisdiction in an agency, and though neither agencies nor courts receive the legislative powers not exercised by the Congress, the rapid growth of communications technology requires a unified system of regulation, and sufficient flexibility and breadth of mandate to permit an agency, confronted with new technology not covered by statute but having serious impact on technology that is, to adopt such regulations as will enable the agency to protect the public interest.[25]

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[25] As authority for its *1976 Report*, the Commission lists Sections 2, 3, 4 (i) and (j), 301, 303, 307, 308, 309, 315, and 317 of the Act. *1976 Report*, 59 F.C.C.2d at 327. Section 2 states those to whom the statute applies. Section 3 is "definitions." Section 4(i) gives authority for all acts necessary to the Commission's function. Section 4(j) specifies proceedings. Sections 301, 307, 308, and 309 cover licensing of broadcasters. Section 303 covers powers and duties of the Commission. Section 317 covers announcements by broadcasters. Section 315 covers equal time for political candidates. The sole reference to cable systems appears in Section 315. The *1976 Report* has no relation to equal time for political candidates on cable television, which is covered in a separate regulation, 47 C.F.R. § 76.205.

In *GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973), the court held that statutory silence did not preclude regulation of the interaction of data processors and common carriers, while denying Commission authority to regulate data processors themselves. And there lies the rub. Regulation to protect the public's vested interest in an established service, against injury from interaction of new technology, is one thing. It is quite another when an agency steps beyond its authority. The former may well be in the public interest. The latter never is.[26]

Respecting the Commission's jurisdiction over cable systems, the Supreme Court has supplied a measure. Under that guidance, the statute is to be given a broad, not restrictive, interpretation. Fur-

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Realism impels recognition that delegation is a necessary part of the modern legislative function. There being no delegation of power over cable systems, we do not here determine a normal "breadth of delegation" question. In a sense, the Commission's rationale, and the Court's "reasonably ancillary" standard, may be analogized to the "necessary and proper" clause, Const. art. I, § 8, cl. 18, applicable to the Congress. If so, the power to issue the present construction and access rules, as discussed *infra*, is not necessary and proper to "carry into execution" the Commission's delegated powers over broadcast television.

[26] That the compliance deadline for some cable systems was rolled forward to 1986, and that the Commission stands ready to "waive" its requirements for those systems able to sustain the burden of proving undue hardship on them individually, cannot justify an agency action exceeding its jurisdiction *ab initio*.

ther, because we are not super-Commissioners, our inexpert view of the wisdom of the regulations under review is not to be substituted for the experience and expertise of the Commission. To shy, however, on those grounds from determination of the legal question touching the Commission's jurisdiction, would be a denial of effective judicial review of regulatory actions "not in accordance with law," 5 U.S.C. § 706 (2)(A) (1970), and an exercise in judicial abdication. The statute having provided no express basis for jurisdiction, we determine the jurisdictional issue in accord with the "reasonably ancillary" standard expressed in *Southwestern*, *supra*, and *Midwest Video*, *supra*.

(2) *The "Reasonably Ancillary" Standard*

Because the Supreme Court sustained its authority to promulgate the rules in *Southwestern* and *Midwest Video*, the Commission says those two cases establish a jurisdiction over cable systems so broad as to authorize the *1976 Report* mandatory access, channel construction, and equipment availability regulations. We disagree.

The jurisdiction found in *Southwestern* was sufficient to encompass prohibition of importation by cable systems of distant broadcast signals into the top 100 markets without a Commission finding of consistency with the public interest. 392 U.S. at 166-67.[27] The Commission's concern was that avail-

[27] The actual Commission order before the Court was in the nature of a "stay," under which no further importation would be permitted until the Commission had had a chance to fully consider the matter. 392 U.S. at 160.

ability of Los Angeles programs in San Diego would fragment the audience of the local conventional television station, risking loss of advertising revenues and curtailment or termination of the local station's service to the public. Petitioner argued that the Commission had no jurisdiction whatever over cable systems. Citing broad purposes in § 1 of Title I, 47 U.S.C. § 151, the Court described the Commission's authority over cable television as restricted to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178.

The rule at issue in *Midwest Video*, requiring cable systems to originate programs, was also held "reasonably ancillary" to the Commission's responsibilities for broadcast television. Noting that "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV [cable television] might properly be exercised," 406 U.S. at 661, the plurality found such objectives in the broad policy statements of §§ 1 and 303(g) [28] of

[28] Section 303(g) of the Act provides:

> 303. Powers and duties of Commission.—
>
> * * * *
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest * * *. [47 U.S.C. § 303(g) (1970)]

[Footnote continued on page 26]

the Act. The four dissenting justices said the upshot of the plurality's holding was "to make the Commission's authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee." 406 U.S. at 681. The Chief Justice, concurring in the result, concluded that until Congress acts, the Commission should be allowed wide latitude, but also stated:

> Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. [406 U.S. at 676.]

In our view, the present mandatory access, channel construction, and equipment availability rules burst through the outer limits of the Commission's delegated jurisdiction.[29] The *1976 Report* nowhere states, and the Commission nowhere argues, that these rules were created and applied to cable sys-

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[28] [Continued]

The plurality opinion did not mention the distinction between "radio," which transmits in the electronic broadcast frequency spectrum, and cable systems, which do not.

[29] We are not alone in the view that the Commission's jurisdiction found in *Midwest Video* must represent the "outer limits." The D.C. Circuit, speaking of *Midwest Video* and *Southwestern*, has said, "That these cases establish an outer boundary to the Commission's authority we have no doubt * * *." *Home Box Office, Inc.* v. *FCC*, No. 75-1280 *et al.*, slip opinion at 34, (D.C. Cir. Mar. 25, 1977), *cert. denied*, No. 76-1724 *et al.* (Oct. 3, 1977).

tems to protect a broadcast station's "contour" as in *Southwestern;* or to require, as in *Midwest*, the origination of programs, like broadcasters do; or to govern an activity involving the airwaves; or to protect the growth of broadcast television; or to protect the public interest in continued broadcast television services;[30] or to protect broadcasting against "unfair competition" from cable, or to allow the Commission "to perform with appropriate effectiveness"[31] its responsibilities for broadcast television.

The standard established by the Court is "reasonably ancillary," not merely "ancillary." The standard is already broad, and the term "reasonably," requiring some nexus with the Commission's statutory responsibility, must not be read out of it. Nor can there be deleted what the Court said cable actions must be "reasonably ancillary" *to*, *i.e.*, "the effective performance of the Commission's various *responsi-*

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[30] The *1976 Report*, 59 F.C.C.2d at 326, itself divorces the present access rules from cable regulations based on the public interest in commercial television:

> In the former case [channel capacity and access rules] we seek to promote the expansion of communications services as well as the expansion of the public's access thereto, while in the latter [limitations on broadest programs retransmittable to cable consumers] we seek to insure that the interest of the public in maintaining a healthy commercial television structure will not be undermined. Although there is some relationship between the two considerations, each must be considered on its merits.

[31] *Midwest Video, supra*, 406 U.S. at 661.

bilities for the regulation of television broadcasting." 392 U.S. at 178 (emphasis added).

The Commission has not shown the slightest nexus between its *1976 Report* access rules and its responsibilities for broadcast television.

Because the free public access concept, on newly constructed, separately designated channels, has nothing to do with retransmission of broadcast signals on existing channels, the relationship or interaction between cable and broadcast systems present in *Southwestern* and in *Midwest Video* is totally absent here. The present rules are not designed to govern some deleterious interrelationship of cable systems to broadcasting, or to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into activities not engaged in or sought; activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting.[32]

Though neither *Southwestern* nor *Midwest Video* supports jurisdiction here, it is a "reasonably ancillary" standard we apply, and it is the *1976 Report* rules we review. Each regulation of cable television must individually stand or fall, not on legal precedent

[32] At the time of *Midwest Video*, cable operators made "no contribution" for the broadcast signals they retransmitted, and the Chief Justice referred to cable systems' "on stream"-with-broadcasting activities as incurring some burden. Though broadcasters might have been earning more from advertisers through cable's increase in their audience, cable operators are now required to pay a royalty on retransmission. *See* 17 U.S.C. § 111 (1976).

concerning other regulations, but on whether or not the regulation under the review meets the standard established by the Court.[33] The Commission reliance on *Southwestern* and *Midwest Video* ignores the indications in those cases that it has no sweeping jurisdiction over cable television, that whatever jurisdiction it may have is contingent upon its delegated powers, and that each attempt to regulate cable systems must be individually justified. *Nat'l Ass'n of Reg. Util. Comm'rs* v. *FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

Thus the Commission argues that the Court's approval of the mandatory origination rule in *Midwest Video* constituted effective approval of the present construction and access rules. The contention is disingenuous. The Court was aware that one way of satisfying the origination requirement was to cablecast programs "produced by others."[34] But that

[33] The Commission appears to have no need for the Court's "reasonably ancillary" standard. In the *1976 Report*, 59 F.C.C. 2d at 299, the Commission reaffirmed its view that cable television "is a hybrid that requires identification and regulation as a separate force in communications." The difficulty with that self-serving view is manifold: it lacks statutory basis; it is open ended, authorizing almost any regulation; and its "separate force" concept ignores the "reasonably ancillary" standard. A private industry does not "require" federal regulation just because a federal agency says it does.

[34] In discussing the definition of cablecasting the plurality stated:

> "Cablecasting" was defined as "programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broad-

form of "access" was not the *mandatory* access required by the present rules. Nor did that form of "access" involve the extensive and expensive construction, and equipment purchase and installation, required by the present rules. Further, the plurality opinion *specifically stated* that no regulation, proposed or adopted, other than the program origination requirement, was before the Court, and that no views were intimated on the validity of any other regulations. 406 U.S. at 652 n.4.

The Commission's argument equating its origination rule and the present access rules disregards fundamental differences between them. Under the former, had it been enforced, cable operators would have had discretion and responsibility for program content, could have sought financial support, and would have been forced to act like broadcasters. Under the latter, cable operators can have no discre-

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> cast signals carried on the system." * * * As this definition makes clear, cablecasting may include not only programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programing." * * * Although the definition now refers to programing "subject to the exclusive control of the cable operator," this is apparently not meant to effect a change in substance or to preclude the operator from cablecasting programs produced by others [406 U.S. at 653 n.6.]

The plurality opinion also indicates an awareness that, prior to its *Midwest Video* decision, mandatory public access requirements had been introduced in the 1972 *Cable Report*, but the only regulations before the Court in *Midwest Video* were those promulgated in the *First Report and Order*, 20 F.C.C.2d 201 (1969). *See* 406 U.S. at 654 n.8.

tion or responsibility for program content, may make essentially no charge, and are forced to act like common-carriers.[35]

Nothing, therefore, in the plurality's approval of the erstwhile origination rule as "reasonably ancillary" in *Midwest Video* may serve to bring the entirely distinct mandatory access rules within that standard.

To be "reasonably ancillary," the Commission's rules must be reasonably ancillary to something. As discussed below, the Commission has no jurisdiction within its statutory grant, under the broadest view of that grant, to force the present free public access rules upon broadcasters, or to make broadcasters into common carriers. Because, as we shall see, the *1976 Report* regulations are an attempt to do just that to cable systems, they can fare no better. The Commission having no power to impose these access rules on either broadcast or cable systems, the *1976 Report* regulations cannot be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

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[35] A further difference is that under the origination rule programs would have at least been produced, though program quality and viewer interest were not assured. The present rules merely insure that cable owners will spend money to construct studios and channels and install equipment, passing some or all of the cost to their consumer-subscribers.

(3) *Objectives*

(a) *Statutory* v. *Commission Objectives*

The Commission's fundamental argument, in support of jurisdiction to issue its *1976 Report* regulations, is based on "objectives."[36] That view permeates the *1976 Report* and the Commission's brief here, the latter stating the issues as (1) whether the rules are a "reasonable exercise of agency authority to promote statutory objectives," in the face of arguments "rejected" in *Midwest Video*, and (2) whether the constitutional arguments, "also similar to those rejected in *Midwest Video*," are without merit. Even if a statutory statement of objectives constituted a grant of power, the objectives on which the Commission relies are not those stated in the statute.[37]

The statutory objectives stated in § 1 of the Act (not cited as authority in the *1976 Report*) are "to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication serv-

[36] The Commission's argument built on *Midwest Video* concentrates on what is claimed to be the Court's "approval" of the Commission's "objectives" in that case.

[37] The entire tone of the Commission's *Notice of Proposed Rulemaking in Docket No. 20508*, 53 F.C.C.2d 782, and its *1976 Report*, indicates a devotion to the goal, *per se*, of public access to cable television. "Accordingly, we specifically reaffirm the *commitment* which we made to the public, educational, governmental and leased *access concepts* contained in the *Report and Order* [*Cable Report*]," 53 F.C.C.2d at 790, and "reaffirm our commitment to access * * * [and] to pursue our *access goals* * * *," 53 F.C.C.2d at 795 (emphasis added).

ice * * *." The Commission does not argue that this, or any one of the statutory sections cited as authority in the *1976 Report*, *see* note 25 *supra*, contains objectives achieved or approached by the present regulations. And well it doesn't. For the Act, however broadly read, contains no objectives so broad as to encompass whatever is necessary to get everybody on television. If that major foray be a legitimate goal, it must be established not by the Commission or the courts, but by Congress.

The "objectives," cited and relied on by the Commission in its brief here, are of its own design: "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."

The Commission draft of objectives in its brief is not the statement submitted to the Supreme Court in *Midwest Video*, where the full statement read, "*to further long established regulatory goals in the field of television broadcasting* by increasing the number of outlets of community self-expression and augmenting the public's choice of programs and types of services." 406 U.S. at 667-68 (emphasis added). The Commission's brief thus tailors a set of objectives to fit the rules it desires here to sustain. To condone that practice would be to turn judicial review of the regulatory process on its head.[38]

[38] The Commission says its objectives were "recognized" in *Midwest Video*. The plurality there did say that the Commission had reasonably determined that the origination rule would further achievement of the objectives cited to the Court, 406

If any specific "long established goals in the field of television broadcasting" are here involved, we are not told what they are. In the statement used to persuade the plurality in *Midwest Video*, "increasing outlets" and "augmenting choices" follow "by," and are thus set forth as *actions* leading to the broadcasting goals. We are cited to no instance in which "increasing outlets" and "augmenting choices" have *themselves* been approved as cable jurisdiction-spawning goals.[39] If "increasing outlets" and "augmenting choices" are goals, they cannot be divorced from the context of broadcasting. That context de-

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U.S. at 667-68, but the relationship of even those objectives to mandatory access rules was not before or discussed by the Court. It was also indicated generally in *Midwest Video* that the Commission was not limited to preventing cable's adverse impact on broadcasting, but could regulate cable systems toward achievement of *statutory* objectives, and that the Commission's objectives were within its "mandate for the regulation of *television broadcasting*." 406 U.S. at 668 (emphasis added). Though the Court in *Midwest Video* stated that § 2 of the Act, 47 U.S.C. § 152, contained no objectives "for which the Commission's regulatory power over CATV might properly be exercised," 406 U.S. at 661, the Commission cited § 2 as among the statutory sections authorizing the present access rules.

[39] As discussed at p. 45 *infra*, whatever the "long-established goals" are, their achievement cannot lawfully be attempted "in the field of television broadcasting" by means of the access rules here at issue. That fact weighs heavily against the claim of jurisdiction to issue these rules as "reasonably ancillary" to the Commission's "responsibilities for broadcast television." Moreover the notion that a federal agency may lawfully compel a private industry, in *any* field, to build facilities, to dedicate them to free public use, and to police that use against obscenity, appears at best unique.

fines and limits the means by which those goals may be sought. Moreover, if the objectives cited in *Midwest Video* and those cited here had been stated identically, that circumstance would not sustain the present rules. The only possible objectives—rules relationship in *Midwest Video* applied to origination. Because the rules are fundamentally different, relationship to an origination rule provides no support for rules enabling anyone and everyone to "get on" cable television.[40]

Doubtless "increasing outlets" and "augmenting choices" are laudable, praiseworthy, and desirable actions. Communication is the life blood of a free society, and "freedom of communication" is virtually synonymous with "freedom of speech" and "freedom of the press." It can be assumed that no agency will act toward objectives perceived as evil, but the world has come to regret many actions taken in the name of attractive euphemisms and appeals to goals beloved by many.

"[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Though those cases did not deal with access-by-all, the quoted principle is unchallengeable. To enliven and enrich the public dialogue is a commendable

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[40] "In the future everybody will be world famous for fifteen minutes." *Andy Warhol*, Boston Book and Art, 3d ed., p. 12 (1970).

intent. We are here concerned, however, not with the Commission's psyche, but with its action. The question before us is not the sincerity of the Commission or the glorious nature of its objectives. The sole question is whether compelling cable systems to build and dedicate facilities to essentially free public use was within the Commission's jurisdiction.

The Commission calls "increasing outlets" and "augmenting choices" its "regulatory policy," pointing not to the Act but to the only former action appearing to support that policy, *i.e.*, *Midwest Video*, which dealt with entirely different regulations. Whether we find the "policy" attractive is irrelevant. A court may favor an agency-esponsed policy, while condemning the agency's exercise of unauthorized power in a specific action taken in pursuit of that policy. The nobility of a goal or policy cannot justify usurpation, by the Commission or by us, of a power to pursue it in whatever manner we think might "work."

The fundamental principle that governmental agencies are limited to the exercise of power delegated by the Congress would be nullified if an agency (like Disraeli, who is said to have preferred the power to write the public's slogans over the power to write its laws) were at liberty to expand its jurisdiction, as far and wide as it wished, by the facile, case-by-case step of re-writing the objectives found in the delegating statute. If "jurisdiction" be synonymous with agency-drafted, *ad hoc* "objectives,"

Congress and the courts become essentially superfluous.[41]

In its *1976 Report* and before us, however, the Commission overrides all concerns, practical, statutory, legal, and constitutional, upon a single analysis, *i.e.*, it is enough that its objectives be good and that its action be reasonably related to them. But the list of good "objectives" conceivable by the numerous regulatory agencies of the federal government, and perhaps achieveable if they had *carte blanche*, is endless. And every act of every agency would be justified, jurisdictionally sound, and judicially approved, if values sought were the sole criterion.[42]

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[41] Congress would still be needed to create and fund agencies, and courts might still be needed to rubber-stamp every action likely to achieve the broad "objectives" improvised by the agency.

[42] The illogic of considering agency objectives as *sole* justification for agency action is illustrated here. The goal of "increasing the number of outlets for local self-expression" can be facilitated by requiring not just cable systems, but theatres, newspapers, broadcast stations, museums, concert halls, universities, and all who have acquired an audience, to grant free public access to their facilities and to a possible "shot" at their audiences.

ACLU points to *Nat'l Citizens Comm. for Broadcasting* v. *FCC*, No. 75-1064 (D.C. Cir. March 1, 1977) in support of a presumption in favor of diversity of expression. In that case, however, the court dealt only with *broadcasters*, holding that the Commission could not refuse to order divestiture of cross-owned radio and television stations, because divestiture increases the likelihood that the public will hear broadcasters with diverse views, and because lack of access by a broadcaster to the airwaves impinged on First Amendment policies.

The Commission has on other occasions faced the delicate task of softening our troubled edges, when there occurs a restriction of someone's right to speak. Government may have to act to prevent single ownership of all television, radio, and newspaper voices in a community. The Commission's mandatory access, channel capacity, and equipment rules are quite another matter. Here the Commission engages in no protection of the right to speak. On the contrary, it has embarked, with positive commands, on a crusade to *create* a public right to use cable facilities.

True, the Commission acted here with a view toward expanding what it considers the goals of the First Amendment.[43] Every regulatory agency should have all constitutional "goals" and restrictions on government in mind in carrying out its duties (the more so where, as here, the agency is operating out-

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There is no conflict with that case in our holding that the Commission lacks jurisdiction to impose access by the public to private cable facilities. That increased opportunities for diverse expression remain high among our society's desiderata does not confer jurisdiction to do what the Commission did here.

[43] Dean Griswold's "decisional leapfrogging," though applied to the Constitution and the courts, may be applied to agencies, which may also decide that, "Well, it really is a good idea." (Here the obviously good idea of increasing opportunities to exercise freedom of speech) *See* Griswold, *The Judicial Process*, 28 Rec. of N.Y.C.B.A. 14, 25 (1973). The present rules are not designed to meet a constitutionally forbidden "abridging" of the right to speak. Nor do they involve the "balanced presentation of ideas" concept of the Fairness Doctrine. They merely attempt to create a public right to speak on cable television.

side its stautory jurisdiction) but we deal here with the Federal Communications Commission not the Federal First Amendment Commission. We are aware of nothing in the Act and have been cited to no other proper source, which places with the Commission an affirmative duty or power to advance First Amendment goals by its own *tour de force*, through getting everyone on cable television or otherwise. Rhetoric in praise of objectives cannot confer jurisdiction. If the Commission desires to operate in an area beyond its statutory borderline of jurisdiction, and to direct an industry, at that industry's expense, to provide and police new opportunities to speak, prior Congressional direction appears a minimum requirement.[44] Composing its own statement of "objectives" will not alone provide the required jurisdictional power.[45]

(b) Objectives and Retransmission

The Commission's brief justifies its zeal for free public access to cable television, as it has most of its

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[44] We do not here consider, of course, whether the Congress could constitutionally so direct.

[45] The Commission's submission of an objectives statement in support of origination, and its submission of *part* of that statement here in support of free public access, is a further illustration of the unreliability of broad, malleable, agency-created, all purpose "objectives" as the sole basis for testing jurisdiction. There is no question that public access necessarily increases outlets and augments choices. The present agency rationale for requiring cable systems to build additional channels, for example, would support the jurisdiction to order a cable system built where none existed, for that would "increase outlets" and "augment choices."

cable regulations, on cable's reception and retransmission of broadcast signals, *i.e.*, its "free ride" on broadcast television, for which cable should "pay" by meeting Commission "objectives." In its *Cable Report*, 36 F.C.C.2d at 190, and in its present brief, the Commission states:

> Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable * * *.[46]

To the extent that cable systems must now pay royalties for broadcast programs retransmitted, note 32 *supra*, the Commission's "free ride" rationale may crumble. Beyond that question, however, the Commission does not "own" broadcast programs, and may not lawfully condition their retransmission on compliance with any and every rule it may devise.

In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), a copyright case concerned with whether cable systems "performed" retransmitted broadcast programs, the Court discussed cable's retransmission activity:

> Essentially, a CATV [cable television] system no more than enhances the viewer's capacity to

[46] The Commission went on to state that cable could not have the economic benefits of signal carriage without having public responsibilities as well. *Cable Report*, 36 F.C.C.2d at 354. The National Black Media Coalition, et al., also emphasizes cable's "free" acquisition of broadcast signals which no longer obtains. *See* note 32, *supra*.

> receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. * * *.
>
> The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. [392 U.S. at 399-400 (footnotes omitted).][47]

In *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966), then Judge, now Chief Justice Burger said, "[N]either is [a broadcaster] a purely private enterprise like a newspaper or an automobile agency. * * * A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." 359 F.2d at 1003. A cable system is on this record a private enterprise. No statute requires or authorizes federal franchising of cable systems. In retransmitting broadcast programs, cable systems use no "limited and valuable part," or any other part, of the federal public domain. The Commission nowhere tells us, nor is it

[47] In *Fortnightly*, the Court held that cable systems did not "perform" programs retransmitted and did not, therefore, have to pay royalties. 392 U.S. at 400-01.

readily apparent, *why* the mere retransmission of broadcast signals makes it "appropriate" that cable be shackled to every Commission notion of what is good for the public—or why the mere transmission of broadcast signals makes it "appropriate" that cable be chained (by requiring it and it alone to build, dedicate, and police new and separate facilities for public use) to the Commission's vision of the future.

The Commission does not say that the absence of 20 cable channels, and free public access thereto, has in any manner impeded "the fundamental goals of a national communications structure." What the Commission does say is that the cable industry must be regulated to give public access because cable is *there*, and has a "potential" to build a many-channeled capacity. *A fortiori*, says the Commission, cable systems must build and dedicate that capacity, to achieve the Commission's "objectives." But nothing whatever in the Act, or anywhere else, gives the Commission the unlimited right to say to any private industry, "We believe we have seen the future, and you must construct it." Because an industry *can* do something cannot be the sole basis for a federal agency's peace-time jurisdiction to make it do it.

(c) Objectives v. *Unsupported Visions*

The regulatory philosophy repeatedly expressed in the *1976 Report* is that the imponderable whims of cable consumers cannot be relied upon, but that fa-

cilities, if built and offered free, will encourage their own use: [48]

> Should compliance with our requirements result in the maintenance of blank or partially blank channels, it is our belief that the time required to realize the full potential for access services will be shortened, for these channels are themselves a visible and continuing inducement to be filled. [*Notice of Proposed Rulemaking*, *supra*, 53 F.C.C.2d at 787-88.]

Building for the future, says the Commission, will enable it to take advantage of cable's "capability," relying thus on a type of trickle-out theory to facilitate its social-engineering effort. The rules under review are thus self-fulfilling: they first compel the creation of excess capacity, and then impose a public access obligation on the ground that the capacity exists.[49] The Commission must have broad discretion

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[48] The *1976 Report* resulted from the realization that many equipment and construction requirements of the 1972 *Cable Report* had proven excessively burdensome, counterproductive, and unrealistic. A major value in a competitive, consumer-choice system lies in the limitation of losses to those entrepreneurs who, like the purveyor of the Edsel, guess wrong about consumer preferences. A major detriment resides in regulatory action requiring massive construction by an entire industry to meet an agency-envisaged future, and with no evidence of consumer demand. If the guess is wrong, everybody loses.

[49] Some, but only some, cable systems have already built 20 or more channels, some in response to the *Cable Report*. That circumstance does not create a jurisdiction in the Commission to compel public access to the facilities of any cable system.

"to respond to changes which necessarily emanate from a dynamic industry," *General Telephone Co. of Cal.* v. *FCC*, *supra*, 413 F.2d at 405, but the present access rules are not a response to change; they are the creation of change, in the "belief" that what the Commission describes as a "societal good," *1976 Report*, 59 F.C.C.2d at 296, will result.

Visions of theoreticians are in proper context of great value. To achieve, man must visualize. And regulatory agencies must take into account both the future and the future effects of their regulations, as best those effects may be estimated on a proper record. But visions of the future, with their low batting average for accuracy, serve poorly as the *sole* basis for regulations having the force of law; [50] and prophecies of even the wisest regulator are no substitute for a lawful grant of jurisdiction.

Regulations like those before us, profoundly altering the obligations of a private business, requiring a fundamental change in its nature, and imposing costs on its consumer-subscribers, should be based on more than an uncertain trumpet of expectation alone. In enforcing regulations designed by the regulator to make futuristic visions come true, courts must proceed with a care proportional to the risk of delivering

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[50] As discussed *infra*, the Commmission rescinded its mandatory origination rule because, *inter alia*, there was no demand for such programs. In its *1976 Report*, the Commission refused to consider whether any viewer demand existed for access programs, though the "access concept" and its *Cable Report* had been extant for years. *See* p. 12 *supra*.

thereby into the regulator's hands an awesome power. For that way may lie not just a totally regulated future, unpalatable as that may be to a free people, but a government-designed, government-molded, government-packaged future.

The public interest rubric encourages judicial deference to an agency's expertise, not to its prescience. Findings may be presumptively correct. Not so futuristic guesses.

Most importantly, jurisdiction is not acquired through visions of Valhalla. An agency can neither create nor lawfully expand its jurisdiction by merely deciding what it thinks the future should be like, finding a private industry that can be restructured to make that future at least possible, and then forcing that restructuring, in the mere hope that if it's there it will be used.

The Commission asserts that it has a mandate to meet the always-with-us "need for additional means of community expression," *Notice*, *supra*, 53 F.C.C. 2d at 790. We need not determine whether the Commission has such mandate. It is enough to hold that, if it does, it cannot pursue it by forcing broadcasters, cable systems, ham radio operators, pay-TV systems, subscription-TV systems, closed-circuit-to theatres systems, data processors, or any other communications industry, to construct facilities and donate them to anyone who walks in.

In short, the Commission has not been charged, even impliedly, with a responsibility of "increasing outlets for local expression and augmenting program

choices," by mandating massive rebuilding and by attempting to deliver the audience of *A* over to *B*, at *A*'s expense, just and solely because *B* wants to get an audience,[51] and in total disregard of what the paying audience wants. Whether lodgement of that responsibility in the Commission be good or bad is not for us to say. It has not occurred.

(d) Objectives and the Public Interest

Jurisdiction having been found wanting, we discuss the public interest parameters in response to the Commission's insistence that its public interest objectives authorize its access rules. We do not decide a public interest question, other than to hold that the public interest is not served by agency actions beyond their jurisdiction. *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943).

The Commission founded its access rules on its belief that the "public interest can be significantly advanced by opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences," *1976 Report*, 59 F.C.C.2d at 296, and refused to be deterred by evidence indicating little likelihood of anyone ever watching access programs. The cable consumer was thus made hostage to the Commission's

[51] A responsibility clearly distinguishable from that of guarding a local broadcaster's audience against cable invasion from afar, as in *Southwestern, supra*.

faith that the equipment he was forced to buy would be used.[52]

The Commission referred to a "need" for access services, but refused to undertake a search for evidence of that need, recommended by two Commissioners. *Notice, supra*, 53 F.C.C.2d at 799-801. Absent evidence that the public is or may be interested in listening, the mere belief that the public interest lies in forcing cable operators to build and deliver to each citizen an electronic soapbox would appear entirely conclusory. As did the public interest in mandating origination, p. 73 *infra*, it may also prove illusory.[53]

In insisting that channels be built, so their blankness will be "an inducement to be filled," the Commission made no reference to the consumer, but stated, "This consideration is true both for the potential channel user as well as the cable operator * * *." 53 F.C.C.2d at 788. But, as with the tango, communication takes two. Speaker minus listener equals zero.

[52] The Act, § 1, includes as a *statutory* objective, the provision of an "efficient" communication service. The Commission does not explain, in its *1976 Report* or in its brief here, how the construction of channels and installation of equipment that may never be used, so far as this record and the Commission's experience with mandatory origination would indicate, contributes to *efficiency* of cable systems or serves the public interest in achievement of this statutory objective.

[53] Intervenors National Black Media Coalition et al. suggest, in their brief at 46, a rule that cable owners be required to promote access, by seeking access users and advertising access programs to their subscribers, because it is otherwise "*impossible* to build an audience for access programs." (emphasis added).

The *1976 Report* is concerned with access by the public, not with access to the public.

Absent evidence that there is, or is likely to be, a substantial national demand by "users who would otherwise not likely have access to television audiences," and whether there is, or is likely to be, any demand at all for viewing by consumers, who would have to pay for access equipment (even if no access programs are produced; or no viewers ever watch), the Commission's argument that its objectives require a public interest conclusion that cable systems must be rebuilt, and mandatory access provided, is seriously undermined.[54]

It would appear that satisfaction of the Commission's desire to advance First Amendment interests in increased communication via its access concept can actually be assured only (1) by an Orwellian requirement that users *must produce* and cable consumers *must watch* access programs,[55] or (2) by a cable sys-

[54] Evidence of strong viewer demand would not alone confer upon the Commission a jurisdiction sufficient to authorize its *1976 Report* mandatory access rules; nor, if jurisdiction were present, would such evidence warrant anything less than the most careful evaluation of First Amendment values involved in the "access concept." Evidence of user demand, *i.e.*, of demand for the free use of another's property, while perhaps less difficult to find or generate, would appear to provide even less warrant for either a finding of jurisdiction or dismissal of the First Amendment concerns expressed at p. 58 *infra*.

[55] Illustrating the problems and dangers inherent in some regulatory attempts to achieve positive goals, as distinguished from prevention of improper, injurious, or criminal conduct.

[Footnote continued on page 49]

tem's provision of access programs in response to its subscribers' desire to view them. If, in broadcasting where viewing is free, "the interest of the viewer is paramount," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1972) (*CBS*); *Red Lion Broadcasting*, *supra*, it would appear more so in cable systems, where subscribers must pay.

A public interest question may be stated as: Who decides whether cable consumers shall pay millions for equipment to enable access programs? The Commission, or the consumer? Nothing of record reflects a public interest in denying consumers that choice, or in forcing consumers to buy what they may refuse to purchase voluntarily. Certainly a merely conjectural connection between mandatory access and likelihood of its increasing true local communication, even if jurisdictionally permissible, would caution us, were we deciding where the public interest lay, against

[55] [Continued]

One intervenors' brief views public access as an opportunity for a minority spokesman to address members of his minority grouping. *Contra*, are those who find that use undesirable, as a potential splintering of society. Lapierre, *supra* note 5, at 120 n.536.

Competitive forces in radio broadcasting, with limited frequencies but *without* mandatory access rules, have not encouraged sameness, but have produced "specialty" stations: all news, black, classical, country, rock and underground. *See* Note, *Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579, 617 (1975).

concluding that the public interest would be harmed if the choice remained with the consumer.[56]

Given the general desirability of the Commission's objectives, we find no basis, in the record made, for concluding that those objectives render the access rules before us "reasonably ancillary" to the Commission's responsibilities for regulation of broadcast television, or that those objectives confer upon the Commission a jurisdiction broad enough to encompass the present access rules.

(4) Ends v. *Means*

To countenance regulation without at least implied authorization of the people's representatives, because the purpose be benign, is to adopt the view that "the end justifies the means" and stop there. But in government as in life, a good end does not justify any

[56] Cable subscribers represent only a small portion of the television viewers of America, and the *1976 Report* exempts from its impact the cable systems serving some of them. The relationship of the public interest in "increasing community outlets" and "augmenting program choices and services" to free public access on cable facilities would be more apparent if the Commission "objectives" were also sought among the vast majority of television viewers to whom programs are supplied within the Commission's broadcasting jurisdiction, and if the *1976 Report* regulations had not required that cable systems hold open a channel for access, even if no one desires access, and precluded the cable owner from using that channel to increase program diversity with his own or pay-cable programming. *1976 Report*, 59 F.C.C.2d at 316-17. The net result of most attempts to regulate cable systems appears to have been to *restrict*, not augment, the number and type of programs available to cable consumers.

and every means. As above indicated, origination and madatory access are very different means indeed, and, as discussed below, the Commission is statutorily prohibited from enforcing its present mandatory access rules within its statutory jurisdiction over broadcasters.

It is not jurisdictionally so that means are immaterial, so long as broadly encompassing "objectives" can be restated from the purpose statement in § 1, or from the powers and duties statement in § 303(g), of the Act. Referring to *Southwestern* and *Midwest Video*, the D.C. Circuit has stated:

> That these cases establish an outer boundary to the Commission's authority we have no doubt . . . and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television. [*Home Box Office, Inc.* v. *FCC*, *supra* note 29, at 34.]

A "well-understood and consistently held policy developed in the Commission's regulation of broadcast television" includes regulatory means as well as regulatory goals. In *Home Box Office*, after noting that the Commission was without authority to control the program content of broadcast television in the manner sought under the anti-siphoning rules there at issue, the court said:

> Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission "regulatory tools" over cable-casting that it did not have over broadcasting. * * * Thus, even if the siphoning rules might in some sense increase the public good, this consideration alone cannot justify the Commission's regulations. [*Home Box Office, Inc.* v. *FCC*, *supra* note 29, at 41-42.][57]

In *Home Box Office*, the Commission was employing means not available in broadcast regulation to control cablecasting activities already underway. Its present effort to employ means not available in broadcast regulation is even further beyond its jurisdiction, for here the Commission is attempting to compel the initiation of particular (access) cablecasting activities. It is at best anomalous to assert that broadcasting objectives are furthered by use of regulatory tools not lawfully useable to regulate broadcasting.[58]

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[57] *Home Box Office* may be interpreted as denying the Commission "regulatory tools" over cable it does not have over broadcasting, as equating government power over cable systems with that over newspapers in the context of intrusion into First Amendment rights, or as confining the Commission to regulation of cable activities having a nexus with cable's carriage of broadcast signals. Each interpretation would apply here, and each necessitates the setting aside of the *1976 Report* access rules.

[58] In a post-hearing submission, the Commission cites *Nat'l Citizens Comm. for Broadcasting* v. *FCC*, No. 74-1700 *et al.* (D.C. Cir. Nov. 11, 1977) and the indication therein that the Commission should consider whether broadcasters could satisfy their *fairness* doctrine obligations by *voluntarily* providing public access. We are at a loss to understand what bearing the cited case has on the present proceeding, which does not involve the fairness doctrine, but which does involve *compelled* access and an effort to impose common carrier type obligations, or to understand how, if at all, the case can be thought to have overturned the Commission's policy respecting forced access to broadcast facilities reflected in *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973) or to have repealed the statutory prohibition against treating broadcasters as common carriers, p. 53 *infra*.

As we have said, regulatory action cannot be "reasonably ancillary" to nothing.

We need not determine what distinctions the Commission may draw between broadcasting and cable systems. It is sufficient to hold that, in making any such distinction, the Commission may not exceed its jurisdiction. However attractively the Commission's objectives are interpreted, reinterpreted, or re-packaged, regulatory actions forbidden as means to achieve them within its statutory jurisdiction cannot be considered "reasonably ancillary" to that jurisdiction.[59]

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[59] To the extent, if any, that "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services" are legitimate goals achieveable in broadcasting, they would appear automatically achievable with respect to those broadcast programs retransmitted by cable. The retransmitted broadcast programs have already had the benefit of Commission regulation. Where cable provides the only television service, and monopolization is a legitimate concern, a requirement that public information programs of broadcast television be retransmitted would appear to be an application of the same regulatory tool used to achieve the same public interest goals achieved within the Commission's jurisdiction over broadcasters.

(5) The Means Are Forbidden Within The Commission's Statutory Jurisdiction

(a) Forced Access

Counsel for the Commission admitted at oral argument that the mandatory access rules here at issue could not be enforced upon broadcasters. Though counsel said the reason lay in scarcity of broadcast frequencies, it appears to have escaped Commission attention that it is the scarcity of broadcast signals that *excuses* its limited regulatory intrusion on First Amendment and other rights of broadcasters. The Commission's notion that the absence of scarcity in the potential number of cables removes the limits on its authority has things backward. The absence of scarcity removes the *excuse* for intrusion.

The reasons why access-to-cable cannot be justified as related to the broadcast milieu are fundamental and pervasive. First, as indicated throughout this opinion, many impedimenta to enforcement of mandatory access have nothing to do with scarcity of broadcast frequencies. Second, the Commission's breadth of regulatory power over "semi-public" broadcasters, though limited, is expressly statutory and greater, not less, than any ancillary power it may have over private media, like cable systems. *See National Broadcasting Co.* v. *United States*, *supra*, at 216-219 (1943). Third, the Commission's confirmed policy is that no private individual or group has a right to use broadcast frequencies, and it has recognized that action contrary to that policy is beyond its jurisdiction.

If there be a relation between public access and the Commission's "long established regulatory goals in the field of television broadcasting," it escapes detection in the Commission's actions within its jurisdiction. The Commission firmly rejected an opportunity to move even partially toward those goals, as it here interprets them, when it was requested to force *paid* and *limited*, not free and fullblown, access on broadcasters. Its resistance was sustained by the Supreme Court, which established that no person has a constitutional right of access to broadcast television. *CBS*, *supra*.[60]

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[60] The Commission correctly says that *CBS* held that it need not force access on broadcasters, not that it could not do so, and that the Court referred to Commission plans to apply access to cable systems. As indicated in *CBS*, 412 U.S. at 113, the Commission and the Congress have consistently recognized the serious statutory and constitutional prohibitions against enforcement of public access upon broadcast facilities. The Court in *CBS* did make a passing reference to proposed access rules for cable systems, but only in the course of discussing the possibility of some form of "limited" access to broadcasting at some future date, *id.* at 131, and *no* Commission rule, access or other, was before the Court. Nor were these access rules before the court in *Home Box Office*, *supra* note 29. The Commission inappropriately argues that footnote 82 in the latter opinion shows that the D.C. Circuit "would approve an access obligation." In all events the non-dicta statements of the Court in *CBS*, and those in *Home Box Office*, are far more persuasive than passing remarks and footnotes relating to matters not before the courts. Concentrating on the latter, the Commission disregards language indicating the impropriety of its access rules, *e.g.*, the non-public interest in access as favoring the wealthy, 412 U.S. at 123; the difficulty of applying the Fairness Doctrine and how its suspension would

Indeed, if there be a "public interest" in achievement of the Commission's "long established goals" through access, the Commission has not attempted to serve that public interest by requiring broadcasters, who reach the vast majority of television viewers and are clearly within its jurisdiction, to give (or even sell), even limited time to the public on a first come, nondiscriminatory basis; nor does the Commission deny broadcasters the right to control the material going out over their facilities.

This court will not interpret the Commission's "long established goals" one way when the Commission is operating near the ancillary fringes of its statutory jurisdiction, and another way when it is operating clearly within its statutory jurisdiction; nor can we believe that the Commission's "long established goals," interpreted by the Commission as authizing public access, are legitimate when applied to cable systems and illegitimate when applied to broadcasters.

Still, at the very time the Commission was telling us that only practicality impeded its full authority to force the present free public access rules upon broadcasters, it refused even to inquire into the need for broadcasters to give even a little time (petitioners sought 90 seconds out of every 7,200 seconds) to Public Service Announcements (PSAs), and to adopt rules enabling citizen groups, minority spokesmen,

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lose more than gained, *id.* at 124; and Congress' conclusion that "the public interest in being informed requires periodic accountability * * *," *id.* at 125.

and in general the same access-seekers involved here, to have their announcements aired. *Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, FCC 77-685 (Released Oct. 13, 1977). The petitioners' "objectives" were paraphrases of those relied on here by the Commission, *i.e.*, an increase in "diversification" of "programming," community service, meeting local needs, favoring "those citizen groups whose voices typically have not been heard on the broadcast media," and providing "needed assistance to citizen groups in communicating their programs to the public." Petitioners also asked that broadcasters make facilities and technical assistance available.

Broadcasters argued, in *Petition*, *supra*, that the "proposed rules would be an impermissable intrusion into [their] programming prerogatives," that "requiring a broadcaster to air a particular type of program matter constitutes censorship," that providing technical assistance would be a "heavy burden" on small staffs, and that giving "special access to certain groups" was contrary to "the Commission's policy that no private individual or group has a right to the use of broadcast facilities." In its decision denying an inquiry, the Commission stated:

> After considering these arguments we believe that even if the First Amendment and Section 326 of the Communications Act are not an absolute barrier, adoption of the instant proposal would be an inappropriate intrusion into the sen-

sitive area of programming. For this reason and because of the licensee's knowledge of his community, he is accorded broad discretion in programming matters, including the scheduling and selection of PSAs.

* * * *

* * * As to providing a preference for citizen group announcements, we note that no private individual or group has a right of special access to the airwaves. [*Petition, supra*, at 4, 6] [61]

Again, in a recent proceeding, *Changes in the Entertainment Formats of Broadcast Stations, Notice of Inquiry*, 57 F.C.C.2d 580 (1976), *Memorandum Opinion and Order*, 60 F.C.C.2d 858 (1976), the Commission concluded that it lacked authority to regulate broadcast program formats, because that action is analogous to imposing common carrier responsibilities on broadcasters and is thus prohibited by Section 3 of the Act, 60 F.C.C.2d at 859; and because "[i]t is impossible to determine whether consumers would be better off [with a particular format] without reference to the actual preferences of real people." *Id.* at 864. The Commission's *1976 Report* attempts to impose a "public forum" format on cable systems,

[61] At this point, the Commission added a footnote: "See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), in which the Commission's long-standing policy against such special access was upheld." The Commission did not, as it does here, refer to the Court's passing remark about the possibility of developing a "limited" form of access, though the remark related, as did *CBS* and the *Petition*, to a demand for *limited* access to *broadcasting*.

and, as discussed below, it does impose common carrier responsibilities, and it totally ignores the preferences of cable consumers, who are "real people."

Thus the Commission exceeded its own recognized jurisdictional limitations in the field of television broadcasting, when it attempted to impose its *1976 Report* mandatory access, channel construction and equipment rules on cable systems.[62] The Commission does not in truth rely here on any "reasonably ancillary" jurisdiction. The jurisdictional genesis for the present access rules is not even allegedly lurking in the lacuna of the Act.[63] It arises not from a power over broadcasting but from a Commission act of creation. Creation, however, is a function of the Almighty, and in the creation of jurisdictional authority, the almighty is Congress, not the Commission.

(b) Common Carrier

Section 3(h) of the Act, 47 U.S.C. § 153(h), provides that "a person engaged in radio broadcasting shall not * * * be deemed a common carrier." In

[62] The present rules are an effort by the Commission to exercise the "authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee" referred to in the *Midwest Video* dissent. 406 U.S. at 681.

[63] The Commission's power to license broadcasters exists only "insofar as there is demand for same * * *," 47 U.S.C. § 307(b) (1970), and the issuances of licenses is the means "to provide a fair, efficient, and equitable distribution of radio service * * *," 47 U.S.C. § 307(b) (1970). Nothing in the *Act* authorizes the Commission to create licensees, or to force anyone to become public access broadcasters, whether to "increase outlets" or for any other reason.

National Association of Regulatory Utility Commissioners v. *FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) *cert. denied*, 425 U.S. 992 (1976), and in *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 608-09, (D.C. Cir. 1976), the court defined the two prerequisites of communications common carriage: (1) provision of service to users indiscriminately; and (2) transmission of intelligence of the user's own design and choosing. The *1976 Report* mandatory access rules require: (1) provision of cable service to users indiscriminately; and (2) transmission of intelligence of the user's own design and choosing. Thus the *1976 Report* imposes common carrier responsibilities on cable systems, and the attempt to bludgeon cable systems into becoming common carriers is an exercise specifically forbidden the Commission within its delegated powers. It is no more jurisdictionally sound than the same action would be if exerted against broadcasters.[64]

The *1976 Report* creates a dilemma and impales itself on the horns. The regulations require that a cable system cablecast access users' programs. If the Commission's equation of "cablecast" to "broadcast" be made, the cable system, as broadcaster, cannot

[64] The Commission is statutorily prohibited from censorship. 47 U.S.C. § 326 (1970). The present access rules not only impose common carrier obligations, it imposes prior censorship duties, *see* p. 66 *infra*, on cable operators. There being no public access to broadcasting, such prior censorship duties have never been imposed on broadcasters, which the Commission is empowered to regulate directly.

have the Commission's common carrier type access rules enforced upon it without violation of the Act.[65]

There can be no question that the *1976 Report* mandatory access rules are an attempt to convert cable systems into common carriers with respect to their bandwidths not used to retransmit broadcast signals. In the parent *Cable Report*, the Commission emphasized that it contemplated "a multipurpose cable operation combining carriage of broadcast signals with program origination *and common carrier service*. 36 F.C.C.2d at 197. (emphasis added) It repeated that contemplation in its *Reconsideration*, 36 F.C.C.2d at 352.[66]

[65] If "cablecaster" and "cablecasting" be read as "broadcaster" and "broadcasting," the access rules actually require that a cable operator become a common-carrier type broadcaster, or a broadcasting-type common carrier. In rejecting petitioner's First Amendment arguments, the *1976 Report*, 59 F.C.C.2d at 299, defends the access rules as permissible, "[w]hen broadcasting, or related activity by cable television systems is involved * * *." The Commission did not explain why, if "broadcasting * * * is involved," it did not apply its broadcast rules. Moreover, because cablecasts are sent only through the cable system's cables, and only to the system's paying subscribers, the equation of cablecasting to "broadcasting," *i.e.*, to sending a communication out over radio frequencies for free pick-up by anyone with a receiver, appears at best tenuous.

[66] That Congress has recognized the giving of the microphone to everyone, even if they pay for it, is making the microphone owner a common carrier, is reflected in the quotations from legislative history quoted in *CBS*, *supra*, at 105-110.

ACLU argues that cable systems have in recent times adopted practices which it says are common carrier in nature, citing *Nat'l Ass'n of Reg. Util. Comm'rs* v. *FCC*, 533 F.2d 601

To keep its "Certificate of Compliance," a cable system must comply with the Commission's mandatory access regulations (or seek a waiver, which has no jurisdictional effect). In *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 592, 599 (1926), the Court found it an unwarranted intrusion into the conduct of a private enterprise for the government to mandate that trucking companies offer their services as common carriers or not at all, rejecting the argument that the state could so condition the use of highways. We find it an unwarranted intrusion into the conduct of a cable enterprise for the Commission to mandate that cable companies offer services as common carriers or not at all, and we reject the argument that it may so condition broadcast program retransmission, which has not even the nexus to cablecasting that highways may have to trucking. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 405 (1974).

Prior to promulgation of mandatory access rules, cable operators had full discretion to decide what originated programming to distribute over their fa-

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(1976), which dealt with point-to-point, two-way, nonvideo communications, not free public access to cable systems facilities. To the extent that cable systems elect to engage in or interact with common carrier activities, those activities or interactions may be subject to regulation; the problem comes when the Commission attempts to force common carrier activities. ACLU's insistence that the access rules of the 1972 *Cable Report* be resurrected, by essentially full common carrier regulation under Title II, with freedom to set lease rates that will attract capital, illustrates the identity of access rules and coercion of cable systems into common carrier activities.

cilities. That would have remained true if the Commission had enforced its origination rule, under which cable operators need not have transmitted communications of all comers. Access rules, removing discretion from cable operators and forcing them to act as common carriers, do not prevent a business entity from acting in a manner injurious to the public interest. The present rules merely accomplish the coercion into common carrier operations of a business neither acting as, nor holding itself out as, a common carrier.

The Commission chooses not to meet directly Midwest's argument that it lacks jurisdiction to force common carrier responsibilities upon cable systems. It merely relies on the broad allegation that its access rules "are reasonably related to achieving objectives." [67] That reliance must fail, for imposition of common carrier responsibilities to achieve broadcast goals impermissibly intermixes the two fields which Congress expressly kept asunder, by its enactment of § 3(h) of the Act, and its separate treatment of common carriers (Title II) and broadcasters (Title III) in the Act.

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[67] "So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question * * * is * * * whether the rules adopted promote statutory objectives" *1976 Report*, 59 F.C.C.2d at 299. The Commission does not tell us how or why its access rules are not far more than merely *denominated* as "somehow" common carrier in nature, or why they are not in fact common-carrier-type rules.

Though the Commission tells us that *Midwest Video* legitimized its present common carrier type access regulations, the Commission told the Supreme Court that the origination rule there involved was an attempt to require cable systems "to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters." Brief for appellants United States and FCC at 15 n.12, *Midwest Video, supra.*[68] Because the Commission's *1976 Report* regulations are an attempt to require cable systems to meet "standards of responsibility to the public" that *cannot* lawfully be "imposed on broadcasters;" they are necessarily divorced from, rather than reasonably ancillary to, the Commission's regulation of broadcasting.

II Constitutional Considerations

The *1976 Report* access regulations having exceeded the Commission's jurisdiction, it is unnecessary to rest our decision on constitutional grounds and we decline to do so. *Benanti* v. *United States*, 355 U.S. 96, 99 (1957); *Neese* v. *Southern Railway*, 350 U.S. 77, 78 (1955); *Peters* v. *Hobby*, 349 U.S. 331, 338 (1954). Moreover, communications technology is dynamic, capable tomorrow of making today obsolete. Referring to First Amendment rights of broadcasters and the public, in *CBS, supra*, the Court said, "At

[68] There was no common carrier question raised in *Midwest Video*. The origination rule had at least the merit of compelling cable operators to do no more than what broadcasters must do, *i.e.*, originate programs.

the very least, courts should not freeze this necessarily dynamic process into a constitutional holding." 412 U.S. at 132.

Though we find it unnecessary to resolve the serious constitutional issues raised, we do hold that where, as here, potential incursions into sensitive constitutional rights are involved, careful scrutiny is required in delineating the scope of authority that Congress intended the agency to exercise.

> Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast television. Indeed, even this standard will be too commodious in certain cases, since * * * the scope of the Commission's constitutionally permitted authority over broadcast television in areas impinging on the First Amendment is broader than its authority over cable television. [*Home Box Office, Inc.* v. *FCC*, note 29 *supra*, at 33-34.]

Moreover, the First Amendment overtones, and other constitutional considerations present in the *1976 Report*, are such as to reinforce our conclusion on the jurisdictional issue.[69]

[69] That the origination rule in *Midwest Video* was free of the potential First Amendment problems created by mandatory access rules serves to further strengthen our conclusion that the "reasonably ancillary" standard, though it legitimized origination, cannot encompass mandatory access.

If jurisdiction existed, necessitating resolution of the constitutional issues, we would not interpret the Commission's

(a) The First Amendment

This is the first case raising the First Amendment implications of a Commission effort to enforce unlimited public access requirements. The Commission has shown a proper care and concern for the First Amendment rights of broadcasters, and for the Act's (§ 326) prohibition of censorship, as illustrated by its resistance to demands for limited access to broadcast television. *CBS*, *supra; Petition*, FCC 77-685, *supra*. That care and concern is remarkably absent from the *1976 Report*, compelling unlimited access to cable television.

Nor does the Commission make any effort before us to indicate that, in its *1976 Report*, it engaged in the required, though difficult, "balancing" task in which it has traditionally engaged with respect to First Amendment values in exercising its jurisdictional responsibilites for broadcast television. Concentrating on creating a public right to exercise freedom of speech on cable television, the Commission gave no thought, on this record, to freedom of the press.

The Commission points to *no* First Amendment right which it believes overrides the First Amendment rights it has recognized in broadcasters but refused to recognize in cable operators. Instead, the Commission's brief dismisses Midwest's concern for

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statutory grant as permitting violation of constitutional rights. *Greene* v. *McElroy*, 360 U.S. 474, 506-508 (1959); *Kent* v. *Dulles*, 357 U.S. 116, 125-130 (1957).

its First Amendment rights in four paragraphs, saying only that cable systems retransmit broadcast signals, that *Midwest Video* authorizes rules designed to achieve the Commission's program diversity "objectives," and that First Amendment goals are promoted by access rules, citing *Red Lion Broadcasting Co.*, *supra*, and language therein concerning an "uninhibited marketplace of ideas" and "monopolization of that market."

Assessment of the proper balance of First Amendment rights must be based on a record, not merely on argument regarding precedent or on resort to an "objectives" rubric. Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). "The line between informing and entertaining is too elusive for the protection * * *" of First Amendment rights to turn on that distinction. *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

In wresting from cable operators the control of privately owned facilities for transmission of programs not acquired from public airwaves, the Commission makes no effort to show that action to have been necessary to protect a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger," or to show "the gravest abuses, endangering paramount interests [which would] give occasion for permissible limitation." *Thomas* v. *Col-*

lins, 323 U.S. 516, 530 (1945). As the Court described the majority error below in *CBS*, *supra* at 126, the Commission appears to have "minimized the difficult problems" created by its access rules, and thus "failed to come to grips" with the important First Amendment considerations present—"the risk of an enlargement of government control over the content of [cablecast] discussion of public issues."

In its desire to accommodate "users who would otherwise not likely have access to television audiences," *1976 Report*, 59 F.C.C.2d at 296, the Commission made no delineation of whether cable systems, absent imposition of its access rules, are public forums. If they are not, it would appear that the present access rules cannot withstand constitutional muster. Every individual's right to speak, precious and paramount as it is, does not include every individual's right to be given the possibility of an audience by government fiat, or to speak in a non-public forum, like a newspaper, a magazine, or on the Senate floor. *See American Communications Association* v. *Douds*, 339 U.S. 382, 394 (1950); *Avins* v. *Rutgers, State University of New Jersey*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). The First Amendment rights of cable operators rise from the Constitution; the public's "right" to "get on television" stems from the Commission desire to create that "right."

It is not enough, therefore, to merely cite the retransmission of broadcast signals by cable systems. As above indicated, no nexus exists between the function of retransmitting broadcast signals and the distinct function of cablecasting. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, *supra*. Cablecasting is communicating, requiring thorough and penetrating consideration of the communicator's First Amendment rights.[70] Cablecasting, however, involves no transmitting over the airwaves or the use of signals acquired from the airwaves.[71]

If there be any arguable relationship between cablecasting and retransmission, it would appear far too tenuous and uncertain to warrant a cavalier overriding of First Amendment rights present in cablecasting.

Concurring in *Home Box Office*, *supra* note 29, Judge Weigel expressed well the concern noted here, in stating:

> [T]he Commission lacks the power to control the content of programs originating in the studios of cablecasters. Such programs involve neither retransmission of signals received over the air from conventional television broadcasting nor transmission over television broadcasting frequencies. They are offered to users of television

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[70] Communication via cable has been held to constitute protected speech, *Weaver* v. *Jordan*, 64 Cal.2d 235, 411 P.2d 289, *cert. denied*, 385 U.S. 844 (1966); as have movies, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

[71] The Commission's authority to regulate with respect to the technicalities involved in cable systems' use of *microwaves* was recognized by this court in *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968).

> sets on terms the users are free to accept or reject.
>
> * * * In relation to cablecasting, the power is so fraught with the potential for impingement upon First Amendment rights that it should not be sanctioned by implication.

Under its *1976 Report* access rules, the Commission is present in each cable operator's studio, holding open the door to all who wish to enter and use it, (turning its back, however, as we shall see, when the pornographer enters). Under some circumstances, the Commission's access rules effectively silence the cable operator, denying him all use of his own facilities, for *any* exercise of his First Amendment rights. *1976 Report*, 59 F.C.C.2d at 316-17. The Fairness Doctrine applicable to cablecasting, 47 C.F.R. § 76.209, would involve the Commission when circumstances give rise to its application, but application of that doctrine to access programs has not on this record been considered by the Commission.[72] The constitutional considerations generated by its access rules require the Commission to evaluate carefully the extent to which it may reside in the studios of cablecasters as one of the issues too sensitive to permit superficial dismissal on the mere ground that cable

[72] One commentator believes that access rules were the Commission's way out of "the fairness cave." Price, *supra* note 5, at 551-52 n.61. *See* note 62 *supra*, regarding the dilemma noted by the Court in *CBS*, respecting the application or waiver of the Fairness Doctrine when public access is mandated.

operators, in a separate activity, retransmit broadcast signals.

Though neither *Southwestern* nor *Midwest Video* dealt with First Amendment concerns, the Commission says it "contemplated" third party access as among its "objectives" in issuing the origination rule approved in *Midwest Video*. If that be so, what may have rested on the backroads of the Commission's mind is irrelevant. Our interest is in what the Commission did; and what it did in *Midwest Video* is entirely distinct from what it did here.

Moreover, our concern at this point is with a fundamental First Amendment difference, which the Commission appears to ignore. Under origination the cable operator may permit access of third parties of *his selection*, and retain ultimate *editorial discretion* and *responsibility* regarding what *programming material* goes out over his lines. Under the present access rules he may choose neither user nor material.

The irrelevance of "objectives," as a sole basis for jurisdiction, is even more apparent when objectives are cited as sole justification for access rules, regardless of their effect on First Amendment rights. *Red Lion*, *supra*, involved application of the Fairness Doctrine to broadcast television. Its language cannot validate the present access rules or justify a disregard of the constitutional concerns they entail. Citation of *Midwest Video* and *Red Lion* cannot serve as a basis for failure to make the First Amendment evaluations required here.

The Commission does not favor us with any views as to: (1) why cable systems are not entitled to the same First Amendment rights as other private media, such as newspapers and movie theatres; (2) how compelled access to cable facilities is distinguishable, in a First Amendment context, from compelled access to broadcast facilities; or (3) how its rule, 47 C.F.R. § 76.256(d)(1)-(3), requiring cable operators to exercise prior restraint of obscenity,[73] and the exposure of cable owners to law suits resulting from its access rules, can be justified. Though we refrain from resting our decision on the Constitution, we note the emphasis in the Commission's brief on the notion that access is old and established ground; but when serious First Amendment questions are raised, *deja vu* will not do.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court held unconstitutional a state effort to compel access to the pages of a newspaper, even for the limited purpose of attack-response. In *Home Box Office*, *supra* note 29, at 72, the court said:

> [S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First

[73] The Commission's request for remand in *American Civil Liberties Union* v. *FCC*, Case No. 76-1695 (D.C. Cir.), indicating the possibility of repeal of prior censorship responsibilities, has no effect here. The Commission may elect not to repeal the rule, and repeal would not resolve other problems involved in the access rules generally. *See* note 19 *supra*.

> Amendment rights of the conventional press, *see Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-256 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point. [footnote omitted]

The present access rules strip from cable operators, on four of their channels, all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the "semi-public" broadcast media. Cable operators must allow use of their facilities, for transmission toward their paying subscribers, of *any* program material, no matter the quality, interest, relevance, taste, context, beauty, or scurrilousness (short of obscenity, when prior restraint is physically possible, *infra*). They must lease a channel to any person, regardless of business reputation, competence, or financial standing. They must permit third-party installation of equipment on the sets of their subscribers who want to watch the third party's program.[74]

Though the Commission's logic would apply, and its "objectives" would be as well achieved, and though newspapers "retransmit" hundreds of government press releases, we assume that no government agency

[74] The Commission places the burden on the cable operator to prove that inferior equipment will *harm* his system's service before it will permit him to refuse installation, and requires that he permit a test installation over a reasonable time to determine whether harm will result, though it recognized that "posting bond may be appropriate" during the test period. *Memorandum Opinion and Order*, 62 F.C.C.2d 399, 404 (1976).

has the fatal-to-freedom power to force a newspaper to add 20 pages to its publication, or to dedicate three pages to free, first-come-first-served access by the public, educators, and government, or to lease a fourth page on the same basis, or to "advance the public interest by opening of [letters-to-editor columns] for use by public and other specified users who would otherwise not likely have access to [newspaper] audiences."

Despite the Court's guidance in *Miami Herald*, *supra*, the Commission has attempted here to require cable operators, who have invested substantially to create a private electronic "publication"—a means of dissiminating information—, to open their "publications" to all for use as *they* wish. That governmental interference with the editorial process raises a serious First Amendment issue. Though we are not deciding that issue here, we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.

If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority, as above indicated, is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters. Were it necessary to decide the issue, the present record would render the intrusion represented by the present rules constitutionally impermissable.

The *1976 Report* spawns a further, and serious, constitutional difficulty of another sort. The Commission's access rules require cable operators to create and operate a public forum, with no control of its content, but with an obligation of suppressing speech the government could suppress because of obscenity or indecency. 47 C.F.R. § 76.256(d)(1)-(3).[75] In so mandating, the Commission appears to have created a corps of involuntary government surrogates, but without providing the procedural safeguards respecting "prior restraint" required of the government.[76] In *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975), the Court described those safeguards as: (1) the censor must initiate judicial proceedings and prove the material unprotected; (2) restraint prior to judicial review can be only for a brief period, to preserve the status quo; and (3) prompt judicial determination must be assured.

When cable operators asked how they could censor obscenity in the open access system required by the

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[75] Midwest's standing to raise the constitutional rights of cable *users* has not been challenged. *See* Note, *Standing to Arrest Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

[76] In *CBS*, *supra*, at 115 *et seq.*, the Court said broadcasters are not engaged in government action just because they are permitted to use the airwaves. Here the government *requires* cable operators to censor. The Court said the First Amendment does not reach acts of private parties in every instance in which the Commission or Congress merely permitted or failed to prohibit the speech-denying act complained of. 412 U.S. at 119. Here the Commission has *ordered* such acts.

1976 Report, the Commission issued a *Clarification*, *supra* note 19, which stated that cable operators *must* "enforce" the rule, and must proscribe all obscene and indecent matter, and, "Indeed, he is responsible to the Commission for doing so." 59 F.C.C.2d at 984. The Commission said cable operators should exercise a prior restraint when possible, and, when that is not possible,[77] cable operators should exclude the offender from access in the future. Thus the Commission made the cable operator both judge and jury, and subjected the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest in satisfying the Commission enlists him on the "safe" side—the side of suppression.

Nor does the *Clarification* appear to have dealt with the chilling effect which fear of future disbarment would have upon access users, (though it referred to such an effect on access services if cable operators had to pre-screen numerous programs). Neither did it discuss the effect on subscriber allegiance to a cable system which must permit live access programmers at least one bite at the obscenity apple. The *Clarification* "suggested" that "distasteful" programs be cablecast at hours that would "minimize exposure to children," but specifically refused

[77] Whether the Commission considered a requirement that all access programs be in the form of videotape, whether the cost of videotape to access users would have limited the Commission's desire to get absolutely everybody on cable television, or whether the commission considered assigning the cost of access videotapes to the cable consumers, is unknown.

to either require or prohibit such scheduling. 59 F.C.C.2d at 985. How any "scheduling" could be done, of programs unknown to and under no control of the operator, was not discussed. Nothing was said in the *Clarification* respecting the prior-restraint safeguards specified in *Southeastern Promotions, Ltd. supra*, or in *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

(b) Due Process

Midwest argues persuasively that the *1976 Report* mandatory construction and access rules constitute a taking of private property without just compensation and deny cable owners an opportunity to earn a fair rate of return, in violation of the due process clause of the Fifth Amendment.

The Commission makes no effort to show that its access rules do not violate the due process provisions of the Constitution. It merely dismisses petitioner's arguments on its "objectives" and on the ground that the same arguments were rejected by this court in *Black Hills Video Corp.* v. *FCC*, *supra* note 71, and by the Supreme Court in *Midwest Video*.

Though we find it unnecessary to resolve the issue, we have rejected the objectives argument above, and we suggest the inappropriateness of the Commission's legal precedent argument. That a violation of due process rights under the Constitution may not have been earlier found by a court, in reviewing regulations concerning cable's use of a microwave company's services and non-duplication rules, as in *Black Hills*, or concerning an origination rule, as in *Mid-*

west Video, cannot for a moment mean that due process concerns raised by the *1976 Report* mandatory construction and access rules may on that ground be dismissed. As in the matter of jurisdiction, each regulation must on its own pass, or fail to pass, constitutional muster.

In promulgating regulations requiring expenditures of many millions of dollars for construction and public dedication of additional channels and equipment, the Commission was not at liberty to disregard due process rights of cable operators, or of cable consumers to whom most if not all costs will be passed. Whether those rights be labeled "economic" or otherwise, they are not in our view obsolete.[78] The human right to own property is a most fundamental right, the alleged deprivation of which cannot be ignored because that right was found uninfringed, or overtaken by the public interest, in cases dealing with earlier and different regulations. If consumers' money is to be taken, in response to a federal regulatory agency's view of the public interest, it must be upon a record far less speculative than that at hand, and on a far stronger basis than court decisions relating to other regulations.

The present access rules, scraped free of argumentative barnacles, require the construction of fa-

[78] The brief of ACLU refers to Midwest's arguments as "obsolete notions of economic due process." Those relying on regulatory power and exuberance, to deliver over the facilities of another at no cost, may rue the day. The regulatory mind is normally unbiased; the regulatory rain falls on all.

cilities and their dedication to the public. Presumably, a requirement that facilities be built and dedicated without compensation to the federal government (for public use) would be a deprivation forbidden by the Fifth Amendment. A "taking" does not require that the government take title. *United States* v. *Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States* v. *Causby*, 328 U.S. 256 (1946). That the forced dedication be direct to the people, rather than indirect through their government, would appear to be of no constitutional moment.

We express concern, also, over the Commission's approach to a further problem engendered by its *1976 Report* regulations. When the cable operator, in policing his access channels, is considering whether an access user is being or has been "obscene" or "indecent,"[79] or whether access should be denied for any reason, there are ghosts in the wings. On one side lurks a fear of violating the Commission's rules, and potential loss of his "Certificate of Compliance." On the other stands the potential for violation of the access user's rights. The exposure of cable operators to law suits, by access users claiming prior restraint of their First Amendment rights, or interference with their new-found "right" to be on cable television whenever, and as often as they like, by the state for

[79] Considering the difficulties experienced by the courts in defining the obscene, the cable operator, were he to engage a battery of lawyers, could hardly be envied this part of the tasks imposed by the regulations under review.

his having transmitted obscene material, by outraged subscribers (whether outraged by obscenity or outraged by having to pay for it) or by persons denied access for any reason, is among the problems which do not appear to have been fully considered by the Commission in its removal of the cable operator's control over his system's programs. The Commission did speak of the censorship and law suit problem in its *Cable Report*, 36 F.C.C.2d at 196:

> We have adopted the no-censorship requirement in order to promote free discourse; this is, we believe, valid regulation having "the force of law." While the matter is of course one for resolution by the courts, State law imposing liability on a system that has no control over these channels may unconstitutionally frustrate Federal purposes. In any event, if a problem should develop in this respect, it is readily remedied by Congress and, in this connection, we would welcome clarifying legislation.[80]

And again on reconsideration:

> Various parties have questioned our judgment that there seems litle likelihood of civil or criminal liability against cable operators from the

[80] The Commission also indicated in its *Clarification* that it planned to seek legislation making obscenity and indecency on cable channels a federal crime. 59 F.C.C.2d at 985-86. Why, if cable casting be broadcasting, such legislation is needed in view of 18 U.S.C. § 1464 (1970) was not discussed. The Commission's monumental lack of success in obtaining legislation giving it general regulatory power over cable systems bodes ill for the notion that the problem is "readily remedied by Congress."

use of access channels. The parties contend, understandably, that our feeling in this matter, however persuasive, is hardly a guarantee. They note, further, that although the cable operator will have no control over program content on access channels, he is charged with proscribing the presentation of obscene material. It is suggested that to this extent, at least, the operator will, in effect, be required to exercise control. To clarify this area, we are requested to seek legislation to grant immunity to a system operating under our access rule. We, of course, appreciate petitioner's concern over the liability issue. We still believe, however, that existing case law solves most problems in this area [footnote omitted]. [*Reconsideration of the Cable Television Report and Order*, 36 F.C.C.2d 326, 357 (1972).]

The subjection of cable operators to potential liability because of the acts of third parties over which they have no control, and the burden and expense of cable operators in trying to convince state courts that the Commission's regulations supersede state law, was not addressed in the *1976 Report*.

The Commission, in its requirement that cable operators exercise prior restraint of obscenity in access cablecasting, attempts to transfer to cable operators the very censorship power statutorily forbidden to the Commission in § 326 of the Act.[81] The Com-

[81] For a review of the difficulties experienced by the Commission in dealing with obscenity and profanity in broadcasting, and the limited use of the criminal prohibition of 18 U.S.C. § 1464 (1970), *see* Note, *Filthy Words*, *supra* note 55.

mission's "belief" that cable operators would be free of legal liability because they were only following orders seems ill-founded when the orders are to do what it cannot do.

The aplomb with which the Commission is willing to forcefully expose cable operators to criminal and civil suits, with all of the uncertainties and serious liberty and financial risks involved in defending them, particularly in these years of America's litigious binge, raises serious questions, about the rationality of the access rules, about the lack of evidence showing a public interest so strong as to warrant them, and about the due process interests effected; all of which would require the closest judicial scrutiny if the access rules of the Commission were to be otherwise held within its jurisdiction.

III The Record

Because the mandatory access and channel capacity rules of the *1976 Report* exceed the jurisdiction of the Commission, we refer to the record only because our reference may be of use in further proceedings.

Concerning abandonment of its cable origination rule, the Commission stated:

> Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been expenditure of large amounts of money for programming that was, in many instances, neither

> wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be. [*Report and Order in Docket No. 19988*, 49 F.C.C.2d 1090, 1105-06 (1974).]

The Commission does not tell us how, if at all, its mandatory access rules would result in "[q]uality, effective, local programming" with the required "creativity and interest" by legal mandate; or why their "net effect" would not be an even greater "expenditure * * * for programming * * * neither wanted by subscribers nor beneficial to the system's total operation;" or why "an outlet for local expression" would not begin to develop under voluntary access "regardless of specific legal requirements" when a "cable community showed a desire" for access programs; or why, if such desire occurred, operators would not feel "compelled" to supply access programs to "attract and retain subscribers;" or why decisions on origination programming "in light of local circumstances" is "as it should be," while decisions on access programming in that "light" should

be denied by force of law to operators, subscribers, and local franchise authorities. In sum, the Commission, in mandating channel construction and public access, appears to have gone directly contrary to its origination experience.[82]

The Commission makes no response, on the merits, to Midwest's argument that the access rules are arbitrary, capricious, and irrational, but remains content to argue that the record information behind its *Cable Report*, by which it first adopted access rules, is not before us.

We do not here find it necessary to review the present record in the detail required when a decision turns on the nature of the rulemaking process, *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). However, the *Cable Report* itself, the *1976 Report*, and its record information, are more than sufficient to illustrate the Commission-recognized speculative nature of the agency's mandatory access action, and

[82] The Commission's assertion that there is no real difference between origination and access rules is not accompanied by an indication that its hopes for access will prove any less forlorn, or its crystal ball any less clouded. The Commission mentioned access rules in the course of abandoning origination, but its assertion here, that access was merely substituted as a less burdensome requirement, suffers from comparison with its *actual* reason for abandoning origination, as formally expressed in its *Report and Order in Docket 19988, supra.* The Commission does not explain how massive rebuilding and public access are "less burdensome" on cable operators than no rebuilding and control of his facilities for his own origination.

to raise a serious question of whether it would be sustained on the administrative record.

Moreover, the right of Midwest, to whom access rules were first made applicable by the *1976 Report*, to judicial review of its challenge to the rationality of access rules *per se* is even more certain than that of petitioner in *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1953), where the underlying rules had long been applicable to petitioner.

The Commission's arbitrary approach to imposition of its "access concepts" appears reflected in the *1976 Report.* Disregarding the results of its flawed faith in origination, the Commission compelled construction of facilities on the obvious fact that failure to construct them would impede their use and on the mere theory and assumption that if they are built they will someday be used.[83] Throughout the *1976 Report*, the Commission describes most of its rules as involving "difficult" problems. In withdrawing and modifying its *Cable Report* rules, the Commission itself characterized some of those earlier rules as: imposing "a very significant burden * * * for which there is no reasonable forseeable need," 59 F.C.C.2d at 306; requiring a two-way capacity for which "developments * * * have been far slower than

[83] It would appear that the logic of this approach would have justified a government requirement for building 12,000 foot runways at every major airport in 1930, or rocket launching pads in 1947, when some were predicting and urging a flight to the moon. The Commission has forbidden the laying of a seventh transatlantic cable on the ground that it may not be used. *Report, Order and Third Statement of Policy and Guidelines in Docket No. 18875,* FCC 77-862 (Dec. 23, 1977).

was anticipated * * *," *id.* at 309; imposing a "burden [converter installation] we have required system operators to meet [we think] is unreasonable * * *," and imposing a cost on "the subscriber who must ultimately pay * * * whether or not he wishes to view the programming being provided * * *," and that may have impeded construction of cable systems in new communities. *Id.* at 313.[84]

In 1974, the Commission stated that it was "too early to discern any trends regarding our leased access channel rules," and that "access is still in its infancy and it has a long-hard-struggle ahead before it becomes an accepted part of the communication process in this country. We knew this would be the case when we instituted the rules * * *." *Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 185 (1974). Two years later, the *1976 Report* contains no discussion of any evidence or investigation of trends favoring leased or other access channel rules.

The Commission implicitly and explicitly recognized that there was insufficient evidence of demand for access programs, present or future, by users or viewers. Recognition of that lack of evidence, and the speculative roots of the present access rules,

[84] If jurisdiction existed, it would be necessary to consider a further issue. When the Commission first adopted its access rules, *Cable Report*, it compensated the affected cable systems, for the burdens imposed, with additional distant signal carriage. With no explanation, the Commission imposed access rules in the *1976 Report* for the first time on other cable systems with no compensation for the burdens thereby imposed.

[Footnote continued on page 87]

appear implicitly in the Commission's reliance on the need to build facilities so they can create their own use, and in its specific refusal to rely on the marketplace. Explicitly, the *1976 Report* contains: "While the overall impact that use of these [access] channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, result in the opening of new outlets for local expression * * *," 59 F.C.C.2d at 296; "there may be need [outside major television markets] for access services * * *." *Id.* at 300. "In addition, the audiences viewing access programming on such [small systems inside major markets] may reasonably be expected to be so small that a federally imposed requirement would appear inappropriate." *Id.* at 303. "Based upon the comments filed in this proceeding as well as those filed in Docket 20363 and our experience generally, while it would appear that the use of access channel is growing, in the vast majority of communities presently providing multiple channels for access use, *these channels are at best sporadically programmed.*" *Id.* at 314 (emphasis added). On reconsideration, speaking of possible denial of access services by cable operators, the Commission said, "Our present experi-

[84] [Continued]

Concerning the compulsion of massive expenditures for cable structures that may never be used, and the cost of which is not recoverable, the *1976 Report* appears to dismiss objection with a touch of the *sang froid*: "when it appears, based on our experience in administering our rules, that they are unnecessarily burdensome * * *, we change them." 59 F.C.C. 2d at 326.

ence has been, however, that *even larger systems typically have difficulty finding access channel users* so this problem with smaller systems is not likely to arise with any frequency." 62 F.C.C.2d at 403 (emphasis added).[85]

The Commission's apparent inability, or unwillingness, to assemble a rational factual basis for its belief that its "access concept" will "work" is the more surprising in view of its relatively long experience with the subject.[86] Seven years before the *1976 Report*, the Commission referred to a possible future requirement for leased access, and adopted the "basic

[85] The Commission devoted a paragraph, *1976 Report*, ¶ 9, 59 F.C.C.2d at 296, to recognition that "public benefits must be carefully weighed against the costs * * *," but the "weighing" related only to the more burdensome construction rules of its *Cable Report*, not to its access concept. The Commission stated that its 1976 rulemaking related only to alternative methods "by which it might reaffirm its commitment to access programs * * *," *id.* at 295; that its 1972 commitment "should not be abandoned," *id.* at 296; and that it had a "basic determination to retain channel capacity and access rules," *id.* at 297. In its *Memorandum Opinion and Order*, 62 F.C.C.2d 399, reconsidering its *1976 Report*, the Commission stated, "There should be no mistake regarding the Commission's continuing commitment to the provision of access services and channels. However, as we stated in the *Report and Order*, this is a very difficult area. Our general reevaluation of the 1972 rules was not intended to reverse our position * * *." *Id.* at 401.

[86] So far as appears in the record, the Commission did not consider the possibility of Commission-designed questionnaires sent by cable operators to their subscribers and returned by the subscribers to the Commission, to determine viewer interest.

goal" of maximum program choice through public access to cable facilities. *CATV, First Report and Order*, 29 [sic] F.C.C.2d 201, 205-06 (1969). Its coercive reach for that goal occurred in 1972, four years before the *1976 Report*, when it issued the channel construction and access rules of the *Cable Report*. In the *Cable Report*, the Commission stated that its judgments on how access would evolve were "intuitive" and that "necessary insights" would be needed. 36 F.C.C.2d at 194, 197, 352. In 1974, two years before the *1976 Report*, the Commission repeated its dedication to use of the public power in pursuit of its predilection for access. *Clarification of the Cable Television Rules*, 46 F.C.C.2d 176, 179-80 (1974). In 1976, still devoid of evidence that any meaningful present or future public demand for access could be expected, the Commission introduced its present action by saying, "We wish to emphasize at the outset that we do not intend in this proceeding to abandon our goals for access cablecasting; * * *." *Notice of Proposed Rule Making*, 53 F.C.C.2d 782, 784 (1976).

In its *1976 Report*, as above indicated, the Commission adhered to its faith in access as a naked "concept," refusing to seek evidence that the public interest would not be harmed by mandating consumer expenditure of millions for equipment never used.[87]

[87] The record of the *1976 Report* is replete with comments that, though there was "awareness" of access programs, few people with something to say were interested in producing them; that almost no one wants to watch in many segments of our vast country; that when access had been tendered it had

The Commission's refusal "to leave the provision of channel capacity and access services entirely to the marketplace * * *," 59 F.C.C.2d at 321, appears contrary to the law limiting the Commission within its statutory jurisdiction, where access to broadcast facilities is governed not by regulation but by market forces. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 407, 475 (1940).

It is not readily apparent that the present rules were based on a clear administrative record that shows existence of a *problem* justifying intrusion on First Amendment rights, or that relates a "solution" to the agency's statutory mandate as required by

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not been used and had been rejected by subscribers; that offers of access had been declined by schools which owned television equipment for its use; that a survey of 149 cable systems showed their access channels, offered under the *Cable Report* rules, went unused an average of 92% of the time; that another survey of 10,000 subscribers showed 97% disinterested in viewing access programs if they cost $1.75-$2.00 per month; that access programs had been voluntarily provided when subscriber interest warranted them. There was no evidence that ordinary market demand could never result in access programs, or that a solemn silence would descend in the absence of mandatory access rules. There was no evidence that programs of so little interest or value that no one and no group is willing to purchase time to present them would garner viewers.

Lack of evidentiary support in the record is asserted by both petitioners. ACLU points out that the Commission has not named the access-supporting groups it says it solicited for comment, or disclosed the criteria used in selecting them, and argues that the economic data reflected a much smaller burden than that used to justify the modification made to the construction requirements of the *Cable Report*.

United States v. *O'Brien*, 391 U.S. 367 (1968). Further, the mandatory access rules explicitly and candidly appear to curtail expression indirectly by favoring access seekers over cable system owners, contrary to the injunction of *Madison Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).

There may rarely be time for complete answers and insights, but the Commission appears to have here failed to defensibly articulate a rationality for its access rules. If jurisdiction were present, and it were therefore necessary to give the present record the "hard look" referred to by Judge Leventhal in *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), it is at best doubtful that a court could avoid finding it reflective of agency action arbitrary and capricious.

Conclusion

The *1976 Report* mandatory channel capacity, equipment, and access rules exceeded the jurisdiction of the Commission. Accordingly, they are set aside.

Webster, Circuit Judge, concurring.

I concur in the Court's decision to set aside the Commission's regulations because they are outside the statutory jurisdiction conferred on the FCC in the area of cable television. (*See* Part I of the opinion.) While I am in general agreement with the extensive and well-reasoned analysis of the constitu-

tional questions contained in Chief Judge Markey's opinion (*see* Parts II and III), I refrain from joining it because disposition of the case on the jurisdictional basis makes it unnecessary to reach those questions.[1]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1] Chief Judge Markey makes it abundantly clear that Parts II and III are not necessary to the result. *See* Slip Op. at 57, 63, 65, and 68.

APPENDIX B

F.C.C. 76-313

[59 F.C.C.2d 294]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 20508

In the Matter of

AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE CABLE TELEVISION CHANNEL CAPACITY AND ACCESS CHANNEL REQUIREMENTS OF SECTION 76.251

REPORT AND ORDER

(Proceeding Terminated)

(Adopted: April 1, 1976; Released: May 13, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONERS WASHBURN AND ROBINSON CONCURRING AND ISSUING STATEMENTS.

1. Effective March 31, 1972, the Commission adopted the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143 (1972), which, *inter alia*, included various channel capacity and access channel requirements for systems located in the major

television markets.[1] In general, systems commencing service after March 31 1972, (hereinafter referred to as new systems) were expected to fully comply with these requirements on commencing service, while systems already in operation as of that date (old systems) were given five years, that is until March 31, 1977, to reconstruct their plant and distribution networks, purchase new equipment, provide minimum studio facilities for the public access channel, and come into full compliance with these requirements.

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[1] These requirements have been contained in Section 76.251 of the Rules, the pertinent provisions of which may be summarized as follows:

Channel Capacity Requirements

1. 20-channel capacity available for immediate or potential use (76.251(a)(1));

2. For each broadcast channel used, an equivalent amount of bandwidth available for non-broadcast purposes (76.251(a)(2));

3. Technical capacity for non-voice return communication (76.251(a)(3));

Access Channel Requirements

4. A single channel each for public, educational, local government and leased channel use (76.251(a)(4)-(a)(7));

5. Equipment and facilities necessary for the production of programming on the public access channel (76.251(a)(4));

6. The provision of additional access channels based upon the utilization of those in existence (76.251(a)(8));

7. The provision of public, educational and governmental access services under certain circumstances at no charge (76.251(a)(10)(i)-(ii)).

[295] 2. In *Public Notices* respectively dated May 15 and 17, 1974, the Commission announced the creation of Re-Regulation and 1977 Task Forces. In an effort to continually review its regulatory program the Commission charged these Task Forces with conducting an examination of all of its rules and regulations respecting cable television. The common goal of the two Task Forces was to study the problems posed by the cable television rules and regulations for the Commission, local franchising authorities and the cable television industry, and to make appropriate recommendations with respect to how these rules might be refined to more fully serve the public interest. The 1977 Task Force was specifically established to study the problems posed by the March 31, 1977 deadline for achieving compliance with the cable television rules.

3. Responding to the recommendations of the 1977 Task Force the Commission adopted the *Notice of Proposed Rulemaking in Docket 20363*, FCC 75-211, 51 FCC 2d 519 (1975), which requested comment upon the necessity of postponing or cancelling the March 31, 1977 reconstruction deadline in view of economic considerations. In that *Notice* the Commission confined its inquiry to the amount of capital required to comply with its reconstruction requirements, the availability of such capital in the marketplace and the overall ability of the industry to achieve compliance by March, 1977. The Commission indicated that an additional Notice would be issued in-

quiring into alternative methods by which it might reaffirm its commitment to access cablecasting for old systems while recognizing the economic realities posed by system reconstruction. It also stated that in the additional rulemaking Notice it would address certain other matters respecting its channel capacity and access channel requirements for both new and old systems.

4. On June 3, 1975, the Commission adopted the *Notice of Proposed Rulemaking in Docket 20508*, FCC 75-644, 53 FCC 2d 782 (1975), which constituted that additional *Notice*. On July 9, 1975, the Commission adopted its *Report and Order in Docket 20363*, FCC 75-821, 54 FCC 2d 207 (1975), which cancelled the March 31, 1977 reconstruction date and suspended any requirement that older systems reconstruct to comply with the channel capacity and access channel requirements pending the outcome of its June 3, 1975 *Notice*.

5. In its June 3, 1975 *Notice*, the Commission requested comment on a variety of matters which related to its channel capacity and access channel requirements. In addition to soliciting views on various alternatives to the March 31, 1977 uniform reconstruction deadline, the Commission determined to reexamine the criterion (location within the 35-mile zone of a major television market) presently utilized to trigger its channel capacity and access requirements for both new and old systems. Also included in that *Notice* was a reexamination of the "two-way,"

"one-for-one" and "converter" requirements for both new and old systems.[2]

[296] 6. In an effort to obtain the views of as many interested parties as possible, the Commission gave broad notice of the matters contained in *Docket 20508* and individually solicited the opinions of over 100 public interest, access, educational and citizens groups. The Commission has received a significant number of responses from various parties, including cable television interests; broadcast interests; public interest and access organizations; individual members of the public; state and municipal cable regulators; educational authorities; and electronic equipment suppliers, submitting diverse observations, opinions and proposals. Comments of all parties were carefully studied and considered. While some parties' comments touched upon matters of more direct relevance to the Commission's *Notice in Docket 20363*, they were largely responsive to this more general *Notice*, and many will be noted accordingly.

7. Based on the comments filed, our experience with the existing channel capacity and access rules since 1972, and a general re-evaluation of these rules in connection with this proceeding, we have determined that several major modifications in our requirements

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[2] The "one-for-one" and "two-way" requirements are contained in Sections 76.251(a)(2) and (a)(3) respectively. The installation of a converter is necessary for certain systems to actually provide the four access channels required pursuant to Sections 76.251(a)(4)-(a)(7) of the Rules. This requirement is discussed in greater detail in paragraph 54 *et seq.*

are necessary. In making these changes we have taken into account a number of important and frequently countervailing considerations.

8. First, we continue to believe that the public interest can be significantly advanced by the opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences. A commitment was made to the provision of these channels in the 1972 Rules which should not be abandoned. There is, we believe, a definite societal good in keeping open these channels of communication. While the overall impact that use of these channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, result in the opening of new outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities.

9. On the other hand, these public benefits must be carefully weighed against the costs the requirements impose. Not only are there costs involved that are directly passed on to subscribers and reflected in the profit and loss statements of cable operators, there are opportunity costs involved as well. Monies expended to comply with these requirements could have been expended in the construction of new cable sys-

tems where none now exist or in the development and provision of different services which might be given a higher value by the public. And, in addition to the direct capital and other expenditures which the requirements entail, there are the other costs in lost flexibility and initiative which are likely to follow with any attempt to impose detailed governmental regulations on private business concerns. Thus, abstract notions of public good must be carefully tested as to their cost and practical, realistic impact.

10. Bearing in mind these conflicting concerns, we have determined to make a number of significant changes in the rules. These changes may be briefly summarized as follows:

[297]

—Delete from the rules entirely the requirement that major market cable systems have the capacity to provide one non-broadcast channel for each channel used to distribute broadcast programming.

—Cease applying the channel capacity and access rules to those systems which, based on a headend or integrated system count, have fewer than 3,500 subscribers.

—Apply all of the channel capacity and access rules to all systems or conglomerates of systems with 3,500 or more subscribers, regardless of whether they are located inside or outside of one of the major television markets.

—Apply the access channel rules on a headend or conglomerate system rather than a community basis so that, in those situations where

an access channel or channels are required, only one channel of each type will be required per integrated system, even if that system serves more than one community.

—Modify our requirements that old systems reconstruct to provide four dedicated access channels, and new systems provide such channels from the commencement of operations.

—Require the provision of four access channels only on those systems that have sufficient activated capacity to provide such channels and only require such channels to be activated as an actual demand for their use develops. For those systems with insufficient activated capability to provide four channels, require the provision of one composite access channel, except in the case of existing systems whose activated channel capacity is completely full, require that access be provided on exclusivity and nonduplication time.

—Require that systems expand the number of channels available for access programming up to the limit of each system's activated channel capability based upon demonstrated use. In no case require the installation of a converter to meet access needs.

—Require those systems with greater than 3,500 subscribers to reconstruct and comply with our channel capacity requirements by 1986.

—Require that two-way capacity be installed on all systems with 3,500 or more subscribers, but not require that any system reconstruct solely to provide this capacity.

11. Each of these matters is discussed in detail below along with a summary of the comments received in response to the *Notice* in this proceeding. However, in view of our basic determination to retain channel capacity and access rules of some type, it is appropriate, before turning to the specific changes adopted, to address a number of arguments raised in the comments that challenge either the constitutionality of the channel capacity and access requirements, or the authority of the Commission to impose them.

12. By far the most extensive comments filed raising these points were those of the Midwest Video Corporation. These arguments in general parallel those raised by Midwest in its appeal of the Commission's adoption of Section 76.253 (the equipment availability requirement) in the *Report and Order in Docket 19988*, FCC 74-1279, 49 FCC 2d 1090 (1974). Their argument has basically five parts: a) that the access rules are equivalent to common carrier regulation and that the Commission has no authority to convert cable systems into common carriers; b) that the requirement to provide channels free for the use of others is an unconstitutional taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution; c) that even if not an unconstitutional taking, the regulations violate the Fifth Amendment as restrictions on a lawful business activity, for they constitute an unnecessary interference with personal or property rights and are not reasonably structured to attain

[298] a valid legislative purpose; d) that the due process clause prohibits governmental requirements necessitating a change in the basic nature of a business enterprise; and e) that the access and channel capacity requirements violate the First Amendment by interfering with the rights of cable operators to communicate.

13. These arguments do not persuade us that the adoption of reasonable channel capacity and access channel rules are either unconstitutional or beyond our jurisdiction. The Communications Act allows the Commission significant discretion in dealing with the developments, demands, and public interest benefits inherent in the dynamic field of communications. The Commission's authority to adopt reasonable cable regulations has been upheld on a number of occasions in several different contexts.[3]

14. In adopting rules to develop the potential of cable television with its abundant channel capacity, as a purveyor of diverse programming, the Commission was affirmed in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The Supreme Court affirmed the Commission's decision to go beyond mere protective measures and also regulate cable with a view to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S. 649, 665. Among those objectives recognized by the Court are increasing the number of outlets for local self-expression and augmenting the diversity of programs and types of services available to the public.

[3] *United States* v. *Southwestern Cable Co.*, 392 U.S. at [sic] 157 (1968); *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972); *General Telephone Co. of California* v. *FCC*, 413 F.2d 390, 398 (D.C. Cir. 1969); *General Telephone of the Southwest* v. *U.S.*, 449 F.2d 846, 863-64 (5th Cir. 1971); *A.C.L.U.* v. *FCC*, 523 F.2d 1344, 1351 (9th Cir. 1971).

15. The Supreme Court upheld the agency's determination that the program-origination rule would serve those objectives. It is equally plain that channel capacity and access requirements will promote those objectives. In fact, the concept of access was included within the Commission's policy determination which was before the Supreme Court in the *Midwest Video* case. The Commission had stated in its *First Report and Order*, adopting the origination rule, that one of the reasons for origination requirements was "to insure that cablecasting equipment will be available for use by others . . ." 20 FCC 2d at 214, quoted in 406 U.S. at 653n. 5; see also 20 FCC 2d at 209. The Supreme Court in affirming the Commission's authority was clearly aware that the cablecasting contemplated by the Commission included not only programs produced by the cable system but also programs produced by others. We believe the rules under consideration in this proceeding will further the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs and that as such they are within the scope of the Commission's regulatory authority over cable television systems that has been upheld by the Supreme Court.

16. Arguments that the rules deny due process, are unduly burdensome, confiscatory, and force cable operators to change the nature of their business, are also arguments which were before the Court in *U.S.* v. *Midwest Video* and, although in that proceeding the charge was that the Commission had forced cable operators into the broadcasting busi- [299] ness against their will, we believe the rationale of the Supreme Court's holding in that proceeding is equally applicable here.

17. With respect to the argument that the access requirements are in effect common carrier obligations which are beyond our authority to impose, we have said that in our view cable systems "are neither broadcasters nor common carriers within the meaning of the Communications Act" but rather that "cable is a hybrid that requires identification and regulation as a separate force in communications." *Cable Television Report and Order, supra,* at paragraph 191. So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow "common carrier" in nature. The proper question, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives. We think they do.

18. Finally, we cannot agree that rules of the type under consideration, which have as their foundation an increased opportunity for communications and a furtherance of First Amendment objectives can be found wanting, as an intrusion on the First Amendment rights of cable operators. When broadcasting, or related activity by cable television systems is involved, First Amendment values are furthered by "an uninhibited marketplace of ideas" in lieu of "monopolization of that market" by the government or a private broadcaster or cable owner. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969).[4]

19. In sum, we do not agree that there are either jurisdictional or constitutional arguments that require us to terminate this proceeding by eliminating the channel capacity and access rules. Having reached that conclusion, we turn to a discussion of the particular rules changes under consideration in this proceeding.

Criterion for the Imposition of the Channel Capacity and Access Channel Requirements

Introduction.

20. In adopting the *Cable Television Report and Order, supra,* we tied our channel capacity and access

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[4] We note that although the cable television access rules were not before the Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973), the Court there discussed the possibility of a "limited right of access that is both practicable and desirable" and then referred specifically to the Commission's cable television public access channel rules.

channel requirements to those systems which were located in the major markets. By allowing these systems greater distant signal carriage we hoped to stimulate the expansion of cable into the major markets; and by imposing channel capacity and access channel obligations on such systems we sought to insure that the growth was accompanied by the provision of nonbroadcast services to these presumably more populous communities. In addition, systems serving these communities were selected to provide access services as a result of the belief that

> . . . cities in the top 100 markets have, as a general rule, more diverse minority groups (ethnic, racial, economic, or age) who are most greatly in the need of both an [300] opportunity to express their views and a more sufficient method by which they may be apprised of governmental actions and educational opportunities. 36 FCC 2d at 197.

21. In commencing this proceeding we noted our continued belief that potential access need is most apparent in larger communities. We also indicated that the major market rule is often inappropriate to meet that need. Within 35 miles of a major market television station there exists not just the central core city but many smaller communities. Many of these communities, because of their size, cannot realistically be expected to have in the near future a demand for the complete range of access services required by our rules. And because of their limited subscriber and revenue potential, compliance with our requirements has posed, we felt, an undue burden for many of these systems.

22. In addition, many very large systems serving large regional population centers have never been required to comply with our access or channel capacity requirements merely because they are located outside of the 35-mile zone of a major television market, yet there may be an equal need for access services in many of these communities. A system operating outside of a television market may provide its community with the only potential for access to a medium of visual communication. As we noted in our June 3rd *Notice*:

> . . . the lack of adequate off-the-air television service in many of these larger communities has resulted in the operating systems obtaining large penetration rates and, generally, financial viability. This viability would seemingly facilitate compliance with our requirements. By providing requisite access services, it is our belief that these systems would more fully serve the communities within which they operate. 53 FCC 2d 782, 792.

23. In our June 3 *Notice*, we sought comment on various alternatives to the present major market trigger. In lieu of this criterion, comment was sought on the possibility of requiring compliance with these requirements based upon system or community size, system profitability, penetration rates or other related indices. The major thrust of these proposals was to exempt from the requirements some smaller

systems to which they now apply and to apply the requirements to some larger systems which are not now subject to the requirements. Comment was also requested on the advisability of determining subscriber count based upon the present definition of a cable television system, which focuses on individual political subdivisions, or alternatively employing for this purpose a conglomerate headend approach.

Comments

24. Parties responding to this part of the Commission's inquiry provided diverse proposals. Midwest Video, as previously noted, argues that the imposition of any channel capacity and access channel requirements regardless of whatever trigger is chosen exceeds the Commission's jurisdiction, violates their constitutional rights and is contrary to public policy. Others assert that marketplace demand is sufficient to foster the provisions of expanded services and that the perceived need to adopt regulations over these matters is evidence that the services required will not be profitable. Thirty cable system operators filing joint comments favored the adoption of an approach tied to number of subscribers as most reflective of a system's ability to finance access channel and channel capacity obligations. These parties suggest the adop-
[301] tion of a 25,000 subscriber figure as the level upon which to base the Commission's requirements. Other cable television interests, including the National Cable Television Association, urge either the complete elimination of channel capacity and access channel requirements or alternatively an exemption for smaller systems within major television markets. Central California Communications Corporation, for example, suggests the maintenance of the present criteria with an exemption for those systems which have fewer than 3,500 subscribers. Michigan CATV Company and Coldwater Cable Television, Inc., urge the Commission to raise any exemption to 5,000 and exempt systems with either less than that number of subscribers or systems which operate in communities with fewer than 15,000 people.

25. Other parties, including various members of the Cable Television Information Center of the Urban Institute, Urban Planning Aid Inc., the Joint Council on Educational Telecommunications and private citizens, Linda Therkelson and Elaine O'Neil, suggest a multitiered approach based on subscriber count. Under these proposals, a system operator's access and channel capacity obligations would increase in incremental amounts in direct proportion to the number of subscribers which the system has. Accordingly, systems with, for example, fewer than 1,000 subscribers might have to provide a channel for access use without providing the facilities for the production of programming. Systems with between 1,000 and 3,500 subscribers might provide one channel with limited production facilities. Once a system obtains 3,500 subscribers under several of these proposals it would be subject to the full panoply of channel capacity and access channel obligations imposed by our rules.

26. In support of limited access requirements for smaller systems, the Joint Council of Educational Telecommunications argues that many local school systems, colleges and universities have their own production facilities and access could, therefore, be provided "at a cost . . . no greater than that of an audio visual modulator." In a similar vein, Dr. Robert Fina points to the fact that Kutztown State College originates programming into the Borough of Kutztown through a cable system "which has far less than 3,500 subscribers" and provides the Borough "with its only means of local television news coverage."

27. Various other parties including Storer Broadcasting, the City of Eugene, Oregon, Leon County Public Library, and the Committee on Regulation and Legislation of Video and Cable of the Communications Section of the American Association of Libraries, while favoring the adoption of an approach tied to subscriber count or percent of cable system penetration do not suggest what the appropriate subscriber count or percent of penetration might be.

28. Opposing an approach tied to subscriber count, Metromedia argues that a cable system's channel capacity is already determined by the time that the first subscriber is signed up and, therefore, any trigger based upon subscriber count leaves the operator unable to determine his responsibilities. Other broadcast interests, in urging the retention of the major market criteria for the imposition of the access rules, assert that these requirements are the *quid pro quo*

for the additional signal carriage permitted systems in the major markets.

29. An opposite approach is suggested by various members of the San Diego School system and the National Education Association, who [302] argue that any requirement that a cable system provide access services should be based upon the absence of other electronic communications services within the community. In support of this position, it is asserted that many smaller communities which do not have local radio or television coverage actually have a greater need for access channels, and this need should be reflected in the Commission's requirements. Other suggestions would tie the provision of access services to an undertaking by the franchising authority, local educational authority or individual member of the public that such body will be responsible for programming one or more access channels.

30. Lastly, a majority of the parties directly referencing it, urged the adoption of a conglomerate headend approach to determining subscriber count. This approach, it is asserted, more totally reflects a system size and corresponds in general with measurement standards followed by the industry.

Resolution

31. The question of what criterion should be used in applying the access and channel capacity rules involves three component parts: a) should the rules apply on a headend or conglomerate rather than community-by-community basis; b) should certain types of systems in the major television markets that

are now subject to these rules be relieved of their obligations; and, c) should some systems outside of the major markets that are not now subject to the rules become subject to them.

32. We turn first to the question of whether we should discontinue our prior practice of requiring that separate access channels be provided to each community served—whether it is not sufficient for one set of channels and facilities to serve more than one community if the system is so constructed that one integrated cable plant serves more than one community. The basic problem is that community boundaries do not correspond to the technical and economic realities of cable television system construction. Technical and economic factors frequently dictate that one technically integrated cable television plant serve many communities. We have, in the process of considering numerous waiver requests involving the question of whether one set of channels could serve more than one community, come to recognize that the provision of access channels is more appropriately related to the realities of system construction than it is to community boundaries. We have, accordingly, determined to reflect this in the rules by applying the rules to integrated cable entities regardless of the number of community boundaries which they may cross. In our pending proceeding looking to fundamental changes in the definition of a cable system (see *Notice of Proposed Rulemaking in Docket 20561*, FCC 75-896, 54 FCC 2d 824 (1975), we indicated our intent to amend our rules to more nearly reflect the technical and economic demands of cable television system operation. While the action taken here is consistent with our proposals in that proceeding, it should be made clear that it is not our intent here to prejudge in any way the broader issues involved in that proceeding.

33. The second major question involving the applicability of these rules concerns whether it is appropriate that they apply to all systems [303] of whatever size that are located in the major television markets. We recognized in the *Notice* in this proceeding that there are systems in the major markets far too small to bear the burdens of providing access services. (See 53 FCC 2d 791-792.) In addition, the audiences viewing access programming on such systems may reasonably be expected to be so small that a federally imposed requirement would appear inappropriate. We accordingly have determined to exempt from our channel capacity and access channel obligations those systems that cannot in general reasonably be expected to have a need for, or be able to support, these services.

34. We have examined community size, penetration rates, and several measures of system profitability, as well as various combinations of these in attempting to determine what criterion should bring the rules into play. Based upon this examination we have determined to alter our channel capacity and access channel requirements to apply only to those systems which have 3,500 or more subscribers.[5]

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[5] The decision as to criteria for applying these rules is, of course, intimately related to the substantive nature of the

35. We have reached this conclusion for several reasons. While the development of a formula which in all cases accurately projects community need as well as system financial viability would be ideal, we have been unable to construct such a formula. The profitability of a cable television system depends on numerous, often interrelated, considerations—the adequacy of off-the-air television reception, the nature and amount of non-broadcast services provided, subscribers per mile of distribution plant, business acumen of the system operator, to name but a few. Similarly, while the need of a community for access services does, we believe, increase with community size, there are other factors including the availability of alternate media within the community which also affect such need. Some generalizations are, however, possible. A cable system's administrative, service and general expense charges are comparatively fixed cost items. The per subscriber costs imposed by these expense items falls more heavily on smaller systems which as a result are often less profitable. As subscriber count increases some economies of scale advantages are realized. These cost advantages become increasingly apparent as the system approaches the 3,500 subscriber level. At that level a system also usually employs several fulltime experienced staff

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requirements themselves. Although for the sake of convenience the applicability criteria are discussed here separately, the criteria were selected with due regard for the impact of the changed obligations which were briefly reviewed above and which are discussed in greater detail in subsequent sections of this document.

members, has gross revenues of at least a quarter of a million dollars (3,500 x $6.50/per month x 12 months=$295,750) and can, we believe, absorb the comparatively small additional expense involved in meeting our requirements. In addition, for a system to obtain 3,500 or more subscribers it must, in general, serve a community of 25,000 or more population.[6] A community of this size or larger may reasonably be presumed to have a need for expanded channel capacity and access services. This is particularly true if the community does not have sufficient alternate [304] sources of local electronic media to which its citizens can gain direct access. By setting our level at 3,500 subscribers we have acted to exempt smaller often less profitable systems from complying with our requirements and insured that larger communities will have the benefits associated with expanded channel capability and the provision of access services. At the same time, we have established a reasonable margin of insurance that the costs imposed on larger systems can be equitably distributed over a sufficient number of subscribers so as not to impose an undue burden on either the system operator or the public.

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[6] Generalizations respecting the relationship between community size and system size are, of course, imprecise. For the most part, however, if a system operates in a community of 25,000 and passes all homes within that community it may reasonably be expected to approach the 3,500 subscriber level mark. The equation is as follows: 25,000 ÷ 2.9 (U.S. Census Bureau est. of persons per home for 1975) × 40% (a reasonable saturation level) = 3,448 subscribers.

36. Several parties in opposing an option tied to subscriber count have argued that such an approach may lead to uncertainty, for the channel capacity of a system must be determined prior to its construction whereas the number of subscribers which a system will obtain cannot be determined until it has been in operation for a reasonable period of time. We do not believe that this is an insurmountable problem. Prior to bidding on a franchise or constructing a system most cable operators conduct marketing surveys either for their own revenue projections or in order to obtain outside financing. These surveys typically include projections of population growth of the franchise area, the number of homes passed each year, the availability of off-the-air television coverage as affecting penetration rates, etc. A key element in these surveys is the number of subscribers which the system can expect to attain in various years of operation. Should these projections indicate that a system might ultimately in fact reach the 3,500 subscriber mark, common sense will dictate that in constructing the system our requirements must be observed. Should there be isolated situations where an operator in good faith for whatever reason misjudges the size of his system we shall of course entertain waivers of our requirements.

37. In choosing 3,500 subscribers as the level upon which to base our requirements we have rejected the arguments of those who believe that a multitiered approach to the provision of access services is appropriate. While we continue to urge the provision of

access services by all systems we do not think that, based on the record before us, additional federally imposed requirements are at this time appropriate. The limited public interest benefits which might be derived from a multitiered approach are, we believe, more than balanced by a need to simplify our requirements and to avoid imposing additional economic burdens on system operators, cable subscribers, and the public.

38. Having determined that it is appropriate to exempt from the obligations of these rules those systems within the major television markets that have fewer than 3,500 subscribers, we next turn to the question of whether these requirements ought not also be applied to those 3,500 or more subscriber systems that are not located in the major television markets. We believe they should and are no longer persuaded that the applicability of these rules should depend on the market location of the system involved. While there are certain differences between the number of signals that are available in the major television markets and in other areas and while there may be some differences between the types of communities, we do not believe these are sufficient to rationally distinguish where the rules should apply. In fact, some of the differences, as for example, the paucity of television [305] programming that may be available in certain areas outside of the major markets, suggest that there may be a greater need for access services in these areas. It is important to remember that there are systems of very considerable size in these mar-

kets. As we noted in footnote 16 of the *Notice* in this proceeding:

> Of the top 25 operating cable television systems in the United States listed in *Cable Sourcebook 1974* and ranked according to number of subscribers, 13 systems serving 277,000 subscribers are either located outside of all television markets (6) or within a smaller television market (7).

In sum, we believe it appropriate to trigger the applicability of these rules by system size rather than by system location.

39. By changing the criterion for applying the rule, we have shifted the group subject to the rules so that only 3,500 subscriber systems must comply. Based on the data presently available to us it appears that, because the rules will now apply to all larger systems without regard to location, more than 50 percent of all cable subscribers will now be on systems providing the full range of the required access services. Between 700 and 800 systems or combinations of systems will be subject to our new rules. While our requirements will impose new burdens on some systems it is important to remember that all systems with more than 3,500 subscribers are already subject to the obligations imposed by Section 76.253 of the Rules. That rule provides that as of January 1, 1976, cable television systems with 3,500 or more subscribers must make available to the public, equipment for local production and presentation of cablecast programs and permit local non-operator production and presentation of such programs. Many of the reasons which led us to arrive at the 3,500 subscriber figure in that context are applicable to our decision herein.[7] Moreover, by adopting the same trigger for our access channel requirements and our facilities requirement we have acted to simplify our rules. By complying with our access rules in the past, a system in effect also complied with our facilities requirements, for the equipment which is required to comply with Section 76.253 is included in the equipment we mandate for the public access channel.[8] We

[7] By requiring that system operators provide equipment for the local production and presentation of cablecast programs and permitting local non-operator production and presentation of such programs, Section 76,253 has been in essence an access requirement. This section was previously set out from the rest of the Commission's access rules due to its history. Unlike the other access requirements, Section 76.253 has its origin in the Commission's former mandatory origination rule which required, in addition to facilities for public production of programming, that an operator with 3,500 or more subscribers engage in programming himself. (See former Sections 74.1111 and 76.201 of the Rules.) Although upheld in *United States* v. *Midwest, supra,* the mandatory origination requirement was subsequently eliminated from the rules based upon the Commission's belief that the availability of cablecasting equipment to the public is a more appropriate means to foster local programming than imposing mandatory programming requirements on system operators whose primary responsibility is to build and maintain their systems and who may not be motivated to produce quality programming of local interest.

[8] In specifying the type of equipment which a cable system with 3,500 or more subscribers must have we stated in paragraph 39 of the *Report and Order in Docket No. 19988,* FCC 74-1279, 49 FCC 2d 1090 (1974):

have determined, therefore, to delete both Section [306] 76.251 and 76.253 from our rules and merge the requirements contained in those sections in the rules we are adopting today. (See appendix.)

The One for One Rule

Introduction

40. We turn next to a consideration of those specific provisions of the rules on which we have sought and received comments. Although in our *Notice* we indicated that we were not considering changing the 20-channel capacity rule, some comments have suggested we do so. The difference in cost between constructing a system with the capacity for 12 channels and building a system with the capacity for 20 channels is small. We also observed that many systems, although not required to do so by our rules, are installing equipment capable of providing 20 or more channels. (See footnote 11, 53 FCC 2d at 790.) Nothing in the comments has caused us to alter our initial opinion. We continue to believe that retaining this

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. . . in order to comply with the rule, the operator must have at least the capacity to afford live programming with one or more black and white cameras, the capacity to video tape record remote programs, edit, and play them back, and the capacity to modulate the resulting video and audio production on a cable channel.

In footnote 12 of that document we stated:

As an example, a one-half inch portable video tape recorder with a camera and appropriate adaptors to connect to an editing/playback video tape deck and to a modulator would constitute a very basic requirement.

rule will aid in insuring the availability of capacity on cable television systems for future broadband communications uses.

41. We did, however, indicate our intent to review the need for Section 76.251(a)(2) of the rules. This section requires that a system subject to our channel capacity rules must maintain bandwidth capable of transmitting one non-broadcast channel for each broadcast channel used. As we observed in our June 3 *Notice*, this requirement has no effect upon any system which furnished its subscribers with ten or fewer broadcast signals because compliance with our 20 channel capacity rule will also satisfy the one-for-one requirement. However, for those systems which provide their subscribers with over ten broadcast signals, compliance with the one-for-one rule may pose a very significant burden by requiring the installation of a second cable or the construction of systems with extremely large amounts of non-broadcast bandwidth for which there is no reasonably foreseeable future need. For these reasons we raised for consideration in this proceeding the possibility of deleting the Section 76.251(a)(2) "one-for-one" requirement.

Comments

42. Comments provided with respect to this portion of our *Notice* have confirmed our initial judgment. The vast majority of parties who directly referenced this requirement in their comments urged its deletion. For example, the State of Minnesota Cable

Communications Board states that compliance with this requirement may unfairly require operators to rebuild their systems even if there is no use for the multiple non-broadcast services which could be provided. When applied to the three systems it owns in the San Francisco Bay area, Western Communications Inc. states that compliance with this requirement would necessitate the construction of a system with between 44 and 54 channel capacity, at an additional cost of between $2.1 and $4.6 million. Such cost, Western argues, may exceed its present $4.3 million investment in these three systems, and cannot be justified in terms of any evidence of future need. Various parties urged that we replace this requirement with a two-for-one rule; that is, for every two broadcast [307] signals carried, the system must maintain one channel for non-broadcast use. Such a requirement it is argued would more reasonably insure the future availability of capacity.

Resolution

43. In indicating the need for a reconsideration of this rule we stated:

> [W]e believe that by framing our channel capacity requirements to mirror the number of television channels which a system provides its subscribers we have created an artificial formula unrelated to the realistic needs of each community which may result in the imposition of unjustified costs to system operators and ultimately to the public (footnote omitted). 53 FCC 2d 782, 795.

The comments filed and our further consideration of this matter confirm our belief that this particular rule does not provide the most advantageous means of assuring adequate cable system channel capacity. Nor do we believe the problems inherent in relating channel capacity to broadcast signals carried can be remedied by changing the form of the rule so that only one non-broadcast channel must be provided for every two broadcast television channels carried. To the burdensome nature of this rule and the lack of any necessary relation between signals carried and the need for non-broadcast channel space we would add a practical problem with the rule which renders it counter-productive in some respects and impractical of application in others. This problem relates, once again, to the realities of system construction. Channel capacity is to some extent set once the system's distribution plant is installed. If the addition of a signal were to trigger a massive reconstruction requirement in order to comply with the one-for-one requirement this would, in the case of a signal whose carriage was voluntary, tend to discourage that signal's addition and, in the case of newly authorized stations whose carriage was mandatory, create great uncertainty at the time of initial construction as to what capacity would be eventually required. In view of these considerations and consistent with the belief that restrictions should be maintained only when there is reasonable evidence of their need, we have determined to eliminate this requirement.

Two-Way Requirement

Introduction

44. Our two-way requirement contained in Section 76.251(a)(3) [9] poses a more difficult problem. At present, systems affected by our channel capacity and access channel trigger must construct their distribution networks so as to provide the capacity for non-voice return communications. In setting for comment the appropriate approach [308] which we should take with respect to this rule, we indicated our tentative belief that compliance with this requirement has not been unreasonably burdensome at least for new systems. We also specifically requested data relating to the incremental costs imposed by this requirement and opinions as to whether compliance with this requirement does in fact tend to facilitate the provision of two-way services.

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[9] It should be recalled that the rule in its present form does not require that the cable system be operational in the return mode. Rather, as we stated in our *Notice* in this proceeding, it was an attempt:

> . . . to insure that new systems would be constructed so as to be capable of furnishing two-way services "without having to engage in timeconsuming and costly system rebuild," when and if a demand arises for such services. As a practical matter, this requirement necessitates the installation of certain passive equipment in the system's distribution network and the use of downstream amplifiers which possess minimum second order distortion characteristics. These amplifiers must also be contained in a "dual housing" unit capable of receiving a second amplifier for upstream use. The actual installation of this amplifier, however, is not required to comply with our rules. 53 FCC 2d 782, 793-794.

Comments

45. Most system operators and cable television interests as well as a few other parties favored the deletion of the two-way requirement. Urging its elimination, California Community Cablevision asserts that while the rule presently provides a burden to system operators, economically viable two-way operations are at least five years away. The Community Antenna Television Association asserts that compliance with this Commission requirement can increase construction costs from 10 percent to 140 percent. The Berkeley Community access center also urges the deletion of this requirement but its replacement by a local standard. Coldwater Cable Television in urging its elimination notes, however, that several experiments are presently underway in the State of Michigan including "an ambitious two-way study at Adrian . . . involving several schools, a resource center, two-way cable TV and expert instructors."

46. The Broadband Communications Section, Communications Division of The Electronic Industries Association, urges the retention of our two-way requirements, arguing that without such built-in capacity systems will tend to stifle or delay the provisions of bi-directional communications. This view is echoed in comments filed by Hendrix Corp. which also favors the adoption of limited operational two-way capability for digital data transmission on an experimental basis noting:

> We have no crystal ball capable of identifying which of the many proposed services or combina-

> tions thereof will succeed. We know, however, as practitioners of high-technology in a computer oriented industry, that the existence of and access to broadband bi-directional digital communications will be necessary when computer and cable technologies merge.

47. A majority of educational authorities also urged the retention of the Commission's two-way requirement. In support of retention of this requirement, the Joint Council on Educational Telecommunications asserts that the present requirement as interpreted leaves up to the system operator the choice of whether to inaugurate two-way services while its elimination would reduce the Commission's future options should two-way operations prove economically feasible. The National Association of Educational Broadcasters urges retention of the requirement, arguing that without such a requirement, systems would in the near future have to undergo lengthy and costly rebuild as "twc-way instructive uses continue to develop and assume increased significance in the educational process." Also urging the retention of the Commission's Rule, the City of Imperial Beach, California, asserts:

> Within the past several years cities such as Imperial Beach have begun joining together to provide government services and to increase governmental efficiency pursuant to intermunicipal cooperative agreements. Cities are sharing data processing and computer time. Cities are reducing capital and operating costs by cooperating in the provision of fire and police services. As this

> trend continues to develop it [309] is reasonable to expect that cities will utilize the two-way capacity of cable systems in a way that will both reduce the cost of government and be of economic benefit to the system.

Finally, in favoring a partial retention of the two-way rule, various staff members of the Cable Television Information Center have provided a study of the costs entailed in compliance with this rule. This study indicates that while the incremental cost of compliance with our two-way requirement is in the order of $200-$300 per strand mile for new systems or systems which have to reconstruct to meet our 20 channel capacity requirement, the cost, $1500, to reconstruct to provide two-way capacity for a system otherwise in compliance with our requirements is substantially higher. In addition, CTIC provided cost estimates to convert our capacity requirement to the theoretical capacity to provide two-way service, absent terminal charges. These estimates are in the order of $700-$2000 per strand mile.

Resolution

48. In attempting to resolve the question of whether to retain, delete or in some fashion modify the two-way capacity requirement we are faced with several distinct, interrelated and competing considerations. Initially, as with the channel capacity requirements generally, there seems to be no necessary relationship between a system's location, within or outside of the major television markets, and the need for

a two-way requirement. And it is also apparent that without a sufficient subscriber base upon which to distribute fixed costs, smaller cable systems will not be in a position to support two-way cable operations of the type our existing requirements is intended to foster. Thus, some adjustment in the applicability of these rules would appear to be in order.

49. A second consideration involves the relatively untried nature of those two-way services which may be provided by cable. The theoretical problems of how to conduct two-way cable operations seem well on the way to solution, but practical problems, both technical and economical, remain. While a number of experiments with two-way cable operations are in progress, practical commercial two-way services are not yet in general operation, and developments in this area have been far slower than was anticipated at the time the requirement was first adopted. In view of this, we cannot say with complete assurance that these services will ever be fully developed, that facilities constructed in anticipation of their development will wholly correspond to the facilities needed after all technical questions are resolved, or that some of the projected services will not turn out to be more efficiently accomplished by using existing telephone circuits or other communications systems.

50. On the other hand, the public benefits of many of the predicted two-way cable service are substantial and worth some considerable effort to facilitate. Moreover, the obstacles faced by these services may be almost insurmountable if the necessary capacity is not

generally installed on cable systems as they are constructed. There is a very real entrepreneurial "chicken-and-egg" problem which has to be overcome for two-way services to develop. If systems generally do not [310] have the capacity to provide these services, then there is little incentive to develop the services. And if the services are not developed, then there is little incentive to install the capacity. Moreover, it seems likely that many of these services will not be economically efficient until economies of scale bring subscriber terminal, headend communications processing equipment, and software costs to some reasonable level. All of this is compounded significantly by a second problem. As the comments make clear, the failure to install two-way capacity at the time of initial construction or at a major reconstruction, undertaken for other reasons, creates very substantial barriers to the later introduction of the capacity. While the costs of adding this capacity initially are modest, it costs almost seven times as much to add the capacity at a later date.

51. A careful review of these considerations with particular emphasis on the modest costs involved in constructing with two-way capacity, the substantial obstacles failure to install this capacity throws in the way of the development of two-way services, and the very substantial public benefits that such services may offer, have persuaded us that there is a need to retain our limited requirement in this area. We believe a continued two-way capacity requirement for those larger (3,500 subscriber) systems commencing

construction in the major markets and the expansion of this requirement to larger systems outside of the major markets will materially advance the day when two-way services are generally implemented. For those smaller systems in the major markets and for those which, under prior rules, would have been required to reconstruct to provide this capacity, we believe the requirement is unduly burdensome and we have accordingly deleted its application to these systems. Those systems with 3,500 or more subscribers that formerly would have had, by March 1977, to reconstruct to provide this capacity will now only be required to provide the capacity when they are otherwise undergoing reconstruction to comply with our channel capacity rules.[10]

52. In taking this action we are mindful of the recent decision of the United States Court of Appeals for the District of Columbia in *NARUC* v. *FCC*, Case No. 75-1075, decided February 10, 1976. At issue in that proceeding was the Commission's authority to preempt state regulation of cable system leased access channels for intra-state, two-way, point-to-point non-video communications. The Court held that the Commission, in attempting to preempt state regu-

[10] That is, a system in full compliance with the 20 channel capacity rule is under no obligation to reconstruct to provide two-way capacity. However, a system required to reconstruct to provide 20-channel capacity will also be required to add two-way capacity as part of that reconstruction. As existing 20-channel systems naturally rebuild it is also contemplated, although not required, that they may take this opportunity to add two-way capacity.

lation of this area, had exceeded its authority. Consistent with this decision we are amending the rules to make it clear that we no longer regard the regulation of these services at the state or local level to be preempted by our regulations. The point decided was, however, a narrow one which, we believe, ought not foreclose our continued authority to require that cable systems construct with the capacity to provide two-way services. Some of the important services which two-way capacity makes possible, such as operational monitoring of the system's functioning, are so clearly related to the distribution of broadcast program- [311] ming as to bring our capacity requirement within the holding of that case.

Dedicated Access Channel Requirements and Composite Access

Introduction

53. Pursuant to Section 76.251 of the Commission's Rules old major market systems have been required not only to reconstruct and provide capacity for 20 channels and two-way by 1977; they were also required once reconstruction was completed to dedicate four separate access channels: one free public channel, one educational and one governmental channel each free of charge to the users for five years after completion of the system's basic trunk line, and one leased channel of a type which could be received by subscribers generally. New major market systems have been required to meet these requirements from the date that operations were commenced.

54. The dedication of these four access channels requires, in the majority of cases, that a system with 20 channel capacity install a converter [11] in each subscriber's home. By installing a converter in each subscriber's home, a system with 20 channel capacity can in fact deliver 20 or more channels of programming to that home. Without installing a converter such systems can at best deliver only 12 channels of programming. Accordingly, the installation of a converter was required to meet the four dedicated access channel requirement if a system as a practical matter provided its subscribers with 9 or more broadcast signals (i.e., 9+4>12).[12] See *Clarification of the Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175, para. 20 (1974).

55. In our June 3, 1975 *Notice* we indicated our intent to proceed on an *ad hoc* basis to waive our requirement to install converters based upon a showing that compliance with this requirement was un-

[11] A converter is a device that changes non-standard frequency channels (e.g., ones above 216 MHz) to standard VHF channels enabling such channels to be tuned directly to the television set. The installation of a converter can also be used to diminish interference from strong over-the-air signals.

[12] Generalizations about usable channel space are in actuality imprecise in view of the reduction in usable channel space caused by a number of factors including co-channel interference from strong over-the-air signals. Because the number of usable channels is reduced by these factors many systems providing 8 or fewer channels would also have to install a converter in order to have sufficient activated capability to provide 4 channels for access use.

reasonably burdensome.[13] In addition we proposed to maintain our commitment to access services by requiring all systems ultimately affected by our access channel criteria to make available existing portions of their bandwidth for composite access purposes regardless of the approach which we ultimately took to rebuilding or installing converters.

Comments

56. Many parties specifically addressing the question of what action should be required to make these dedicated channels available, urged [312] that the costs of adding converters or rebuilding system plant were so substantial as to far outweigh whatever public benefits there might be in maintaining the multiple dedicated channel concept. This was particularly urged to be the case in situations where it was alleged that existing activated capability already offered for access uses remained unused over long periods of time. Many system operators pointed to the expense involved in installing converters in each subscriber's

[13] In delineating the type of sharing we would require we stated:

> We would envision entertaining requests to waive our converter requirement only in the case of smaller systems whose projected revenues and subscriber potential are such that the imposition of this requirement would appear to be demonstrably burdensome. These systems should also be prepared to demonstrate that there is no present nor reasonably forseeable future demand for the channels to be added and that should such a demand arise, converters would be installed within a reasonable period of time.

home.[14] For example, Central California Communications Corporation and Cable-Com General state that the installation of converters doubles the cost of system rebuild. Storer Broadcasting Company indicates that a rate increase of $1.75 to $2.00 per month would be necessary merely to cover the costs of installing converters on its systems. Viacom International Inc. notes the following:

> The average converter presently costs approximately $40. Installation and fittings bring this figure to approximately $50. If this converter is depreciated over a four year period, it will cost approximately one dollar per month to furnish each subscriber with a converter. Since this is eventually passed on to the subscriber, the subscriber who now pays for example $5.50 per month for basic cable service will pay an additional 18 percent of his present charge for access channels he may not want. These costs do not consider converter maintenance, loss of devices, and financing costs for the units. . . . This increase in the subscriber rate will lead to the loss of subscribers and inevitably an even higher rate.

57. Many parties including various cities and public interest groups urged the provision of composite access services rather than the installation of a converter if such is necessary to provide the four separate access channels required by the rules. Gill Cable

[14] In our June 3rd *Notice* we estimated that the cost of installing a converter in each subscriber's home is between $25-40 per subscriber, exclusive of labor.

notes that while it is presently programming over 100 hours a week on its system's public access channel in San Jose and Campbell, California that viewership identification will be enhanced if systems are permitted to provide all access programming on one channel rather than the designation of multiple separate access channels. The City of Eugene, Oregon, in a similar vein notes that public agencies are reluctant to invest the significant amounts of money necessary to utilize separate designated access channels at this stage of cable's development. "Programming a composite channel would require less investment for each participating agency and would give viewers more reason to turn to that channel since it would be more consistently utilized. . . . It is more realistic to initially require a composite access channel . . . to encourage the desired use of cable and allow for expansion with need. At the same time, it is important that stimulus for expansion be provided." Other parties argued that the Commission should never require the installation of a converter solely to provide access services; or that cable operators should be permitted to assess a direct charge on those subscribers who wish a converter to view access programming. Lastly, several parties point to the results of various studies on access channel use and viewership conducted either by themselves or independent organizations[15]

[15] See, e.g., Bretz, R., *Public Access Cable TV: Audiences*, Journal of Communications, Summer 1975 at 15. Doty, P., *Public Access Cable TV: Who Cares*, Journal of Communications, Summer 1975 at 33. Johnson, R. C. and Agostino, D.,

which they allege demonstrate that there is very little present demand [313] for the provision of four access channels and our rules should be modified accordingly.

Resolution

58. This is a difficult area. It is clear that cable systems generally could, from a technical point of view, be reconstructed or otherwise modified to provide the four dedicated access channels now required of major market systems. The question, however, is whether the public benefits of having these multiple dedicated channels outweigh the costs that may be incurred in order to provide them. If it is concluded that the requirements in their present form are unduly burdensome we need then consider what lesser obligations might nevertheless be appropriate.

59. There seems no dispute that the costs to provide these channels are frequently very substantial. To comply, some systems would have not only to replace all of their trunk and distribution cable and amplifiers, but also install converters. Just looking at the converter cost alone, a 3,500 subscriber system would have to invest, at $40 per converter, at least $140,000, or more to meet this requirement.[16] The

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The Columbus Video Access Center: A Research Evaluation of Audience and Public Attitudes, Institute for Communication Research, Indiana University, 1974.

[16] This is an overly simplified calculation because, among other things, systems using converters frequently need not only one converter for each subscriber but a substantial inventory of spare converters to replace those broken, lost, or stolen.

installation of a converter is one of the single most costly items involved in cable system reconstruction. It is also clear that there is an equivalent burden placed on new systems which may, pursuant to our rules, have to acquire the additional capital to provide converters prior to the commencement of operations and the generation of any revenues. Compliance with this requirement may very well therefore have had the undesirable effect of retarding new system growth and expansion of access services generally.

60. While the requirement poses an equivalent burden for both new and old systems it also equally affects large and small. The per subscriber cost of compliance with this requirement, unlike other portions of our access and facilities requirements does not significantly diminish with system size. Whether a system operator has 500 subscribers or 5,000 he still must pay, exclusive of labor charges, at least $25-40 per subscriber if he wishes to install converters.

61. Upon further examination of this area we think that the burden we have required system operators to meet is unreasonable and that our requirement to rebuild or to install converters if such is necessary to provide four dedicated access channels should be eliminated. By retaining and expanding our 20 channel capacity and two-way requirements for larger systems we insure that larger new systems and those being rebuilt will provide capacity which will facilitate the provision of access and broadband

services in the future. By mandating the installation of converters we have required present excess capability at a substantial cost not only to the subscriber who must ultimately pay for the installation of that device whether or not he wishes to view the programming being provided but also to the citizen in the community where the benefits of new cable service will not be realized because the funds available in the marketplace have been diverted as a result of our requirements.

[314] 62. Based upon the comments filed in this proceeding as well as those filed in Docket 20363 and our experience generally, while it would appear that the use of access channel is growing, in the vast majority of communities presently providing multiple channels for access use, these channels are at best sporadically programmed. Rather than requiring the separate dedication of access channels for different uses which necessitates the installation of converters, we believe that our goals for access cable casting will be furthered by allowing the provision of access services on one or more channels which may be shared among different access users. The provision of access services on a shared or composite basis will, we believe, foster the success of access efforts by enhancing viewer identification with a channel which is more fully programmed, rather than dispersing individual access efforts among several channels which are not. Several of the parties filing comments in this proceeding have recommended such an approach, and it is in

fact consistent with our prior observations. See paragraphs 14 and 15 of the *Clarification, supra.*

63. Many systems without installing converters have one or more channels available to provide access services. A review of data submitted to the Commission indicates that cable systems throughout the country provide their subscribers with an average of approximately 9 broadcast signals, thus leaving up to three channels for potential access use. Many systems which do not possess a full channel can provide access programming on the "black out time" which occurs as a result of compliance with out exclusivity and nonduplication requirements. We think that the provision of access services under these circumstances for systems with limited activated channel capability will be sufficient to meet most present access channel needs.

64. We have, accordingly, modified our rules in several major respects. First, while we shall maintain our commitment to the provision of four specially designated access channels we have modified this requirement to make clear that (a) it will only apply to those systems with 3,500 or more subscribers which have sufficient channel capability, without installing converters, to provide such multiple channels, and (b) each specially designated channel need only be provided when there is a demand for such channel's full time use. Second, in view of our belief that in the majority of cases, all access needs can be met by the provision of one access channel for composite access programming, we have determined to modify

our rules to require that cable television systems with 3,500 or more subscribers provide at least one designated access channel for shared use among public, educational, local government and leased users, if such a system's activated channel capability is sufficient to provide such channel.[17] For those systems [315] which do not have sufficient activated capability to provide even one full channel, the designation of "black out time" will be required, though it is a less desirable alternative.[18] Consistent with this approach,

[17] Pursuant to Section 76.253 old major market systems with 3,500 subscribers which did not have to comply with the provisions of Section 76.251 until March 31, 1977 as well as all those systems with 3,500 or more subscribers located outside of the major markets were required to make at least a reasonable effort to provide channel time for the local non-operator presentation of cablecast programs. We intend to initially maintain that policy and not require such systems to dedicate a separate channel for access use until March 31, 1977. As of that date, however, such systems will be required to dedicate one access channel for composite access programming provided their activated capability permits them to do so. Such systems will also not be required until such date to provide five minutes free production time for public access use or studio facilities. By retaining this one year leeway we seek to avoid any inequity caused by our decision to merge the requirements formerly contained in Sections 76.253 and 76.251. As of March 31, 1977 all systems with 3,500 or more subscribers will be required to comply with our access rules uniformly.

[18] The selection of "black out time" to fulfill the system operator's access responsibilities is less than an optimal approach. Black out time occurs on different channels at different times depending upon various factors including the scheduling practices of the local television station licensee. Neither predictability of time nor channel is fostered under

we do not envision certificating new systems or the addition of new signals whose carriage is not mandatory to existing systems, if the activated channel capability available for the provision of access services is insufficient to provide at least one full channel for access programming. We have also amended our channel expansion formula to make clear that it does not require the dedication of channels beyond the systems' activated capability. (See Section 76.254.) In no case will the use of this formula therefore require the installation of a converter in each subscriber's home. In addition, we have modified our rules to make clear that at all times when any of the access channels are not in use, such channels may be used for other broadcast and nonbroadcast purposes, provided such use is consistent with other provisions of our rules. (See Section 76.254(b).)

65. In determining a system's activated channel capacity available for the provision of access services we shall look first to the number of usable channels actually provided to each subscriber's home. A channel which cannot be programmed due to co-

these circumstances. In general, however, much of the black out time which occurs as a result of our network nonduplication requirements occurs during the hours of 1-4 in the afternoon and during "prime time" in the evening. An operator might wish to give priority to educational access use during this afternoon period while reserving the evening for other access programming. The establishment of such reasonable classes and the allocation of separate times to them in a system operator's access channel rules would be entirely consistent with the objectives of the revised rules.

channel interference, for example, is of course not a usable channel. A channel which could be provided to each subscriber's home merely by installing a modulator, at a cost of $800-$1200, and making some comparatively inexpensive modifications to the system's headend is deemed a channel provided to each subscriber's home for purposes of the application of this requirement. In determining the number of channels available for access programming we have specifically excluded those channels already programmed by the system operator for which a separate charge is made. Those channels are most frequently used to provide pay entertainment programming to only those subscribers who desire such programming and are willing to pay an extra charge for it. We do not include these channels as available for the provision of access services in view of the costs which have been incurred by the system in purchasing and installing "traps" and otherwise providing this service as well as the benefits to subscribers in terms of increased diversity of viewing choices derived therefrom. From the total number of usable channels provided to each subscriber, those channels used to provide traditional cable television service, i.e., channels providing television broadcast signals, are subtracted. We are left with activated channel capability available for the provision of access services. These channels include channels provided the subscriber but not programmed as well as those providing other non-broadcast programming, i.e., automated program- [316] ming, orig-

ination channels, etc. for which a separate assessment is not made.[19]

66. By requiring the expansion of access channels only up to the limitations of the system's activated capability, we desire to foster the provision of access services without imposing converter costs on all subscribers, some of whom may be uninterested in viewing the access programming provided. Consistent with this approach our rules may not be construed as permitting a system operator to exclude a potential access user who intends to use a channel, install converters himself, and pass such costs along to those who wish to view the additional programming provided thereby.[20] Where leased channels are involved,

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[19] It is our intention that every reasonable effort be made to accommodate the various competing channel uses. It is not our intention that established cablecast services provided by system operators be automatically displaced. While we generally believe that automated services such as time and weather channels should give way to access uses, if other irreconcilable conflicts between channel uses develop, we are prepared to consider each such situation individually on its merits. We recognize that many of the services provided on these channels, such as community information, consumer price lists, etc., clearly provide a substantial benefit to subscribers.

[20] We note for example that even systems possessing "12 channel capacity" amplifiers can often obtain an additional channel or channels by installing a converter and programming on the "mid-band." Should a potential educational, governmental or leased channel user desire to program this channel and pass the costs of converters on to those who desire to view whatever service is provided, we shall require the system operator to permit him to do so.

charges may be assessed for channel time, provided they are not designed to prohibit entry. See *Clarification, supra*, at paragraph 34.

67. We expect the operator in general to administer all access channels on a first come, first served non-discriminatory basis. We recognize that some of the potential educational, governmental, as well as leased channel uses may not by their very nature permit the shared use of the channel provided, e.g. classroom educational access programming, the interconnection of governmental agencies, etc. To the extent that this is the case we shall expect the operator to make additional channels available for the provision of other access uses up to the limit of his activated capability. In administering the access channels provided we shall rely on the good faith of the operator to meet his access obligations.

68. There are, however, certain actions which we shall consider as evidence of bad faith on the part of system operators in meeting their access obligations. We do not consider as acting in good faith an operator with a system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts. While we shall continue to encourage operators to originate, we do not believe that the public interest will be served if such efforts are at the expense of others who wish to provide access programming. We shall scrutinize the actions of operators who, while providing their own programming, assert that their activated capacity is insufficient to permit the leasing of a channel to

potential competitors. Should the need arise we shall take whatever action is appropriate to prevent system operators from using their control over their system to exclude the presentation or alternate sources of programming. (See Section 76.254(c).)

69. A closely related matter concerns the presentation of pay entertainment programming. We have sought to encourage the presentation of such programming for it provides diversity of viewing choices to the public. We do not, however, believe that the public interest will be [317] served if this programming is provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming. Should it appear that the growth of pay services is in fact substantially infringing on the public's ability to obtain access on cable television systems we shall promptly revisit this area and take whatever action is appropriate to prevent such an occurence.

70. As a result of our decision to merge our access rules and facilities requirements and to allow the provision of composite access services in many cases rather than separately dedicating different access channels, our rules have been modified in several additional ways. Consistent with our previous actions respecting our facilities requirement, we shall expect system operators to identify the type of service being

presented on the composite channel (i.e. origination cablecasting, access cablecasting, or inclusion of television station identification) and the person or group presenting the program. Whether other provisions of the rules, e.g., equal time, fairness, sponsorship identification, and advertising are applicable, will continue to depend upon which type of cablecasting is being provided. (See e.g., Sections 76.205, 209, 213 and 215.) In the case of access programming we shall continue to require compliance with the applicable regulations concerning program content control, assessment of costs and operating rules. See Sections 76.256(b), (c) and (d).

71. A related matter concerns the provision of a studio. At least a minimal studio has been required in order to comply with our access requirements whereas our facilities [sic] equipment "although requiring the capacity to provide live programming," has been silent on this matter. In delineating the type of studio required to meet our present rules, we have been liberal. A system may choose to designate one room on a full-time basis as its studio. Alternately, should sufficient space not be available, it may choose to designate part of a room on perhaps a part-time basis as its studio. In merging our two requirements we shall continue this approach. So long as there exists some inhouse capacity for members of the public to record programming, we shall consider our studio requirement satisfied for all systems with more than 3,500 subscribers.

72. We have also determined to modify our prior requirement for the five year free availability of the government and educational access channels. Instead of running from the date of completion of the system's basic trunk line, the five years shall be triggered from the date the system first offers channel time to such entities for cablecasting. Our intent in adopting our original requirement was to allow a five year experimental period for the free provision of the government and educational access channels. As a practical matter, however, such provision was not in fact required by our rules for many older systems until March 31, 1977. In many cases, this date was more than 5 years after such systems' trunk lines were completed. Our intent remains the same under the new rules and we have modified them in an effort to insure that some reasonable period of experimentation will in fact occur in all cases.

[318] 73. Several additional editorial changes have also been made that are designed to implement prior policy statements or clear up misunderstandings under the prior rules. Our leased channel rule has been modified to specify, for those systems which possess sufficient activated capability to provide four access channels, the provision of a full channel for leased use. This is in accord with our prior policy. (See *Clarification*, *supra*, at para. 20.) We have also modified our channel activation requirement now contained in Section 76.254(c) to specify that the time trigger employed (channel use for 80 perent of the time during any consecutive three hour period for six con-

secutive weeks) applies to each channel individually. (See *Clarification*, *supra*, at para. 21.) Lastly, we have added equipment and personnel costs to the section specifying what charges can and cannot be made for the provision of access services. (See Section 76.256(c)(3). Our prior rule merely specified "production cost" and it was our intent to include equipment and personnel costs within such cost. By specifying equipment and personnel costs in the rules we adopt today we have attempted to clarify our prior policy.

74. Once older systems are rebuilt to provide expanded channel capacity and converters are installed as a result of the individual business judgment of system operators many of the problems presently encountered in this area will disappear. Until that time the administration of the composite access channel approach will undoubtly present many difficulties. We shall, after some experience with these new rules has been gathered, issue a primer on various matters respecting our access channel obligations by which we hope to further clarify our position on these matters. We shall also administer our approach in a flexible manner and shall not hesitate to revisit this entire area should our experience dictate that our public interest goals are not being met.

Alternatives to the March 31, 1977 Rebuild Date for Old Systems

Introduction

75. Having determined which systems must comply with our access and channel capacity requirements and eliminated or modified some of these re-

quirements, we focus now on how and when to require compliance on the part of old systems which would have to reconstruct to meet our channel capacity rules.

76. In lieu of the imposition of the March 31, 1977 reconstruction deadline for old systems, we sought comment upon the possible elimination of the channel capacity and access channel requirements for old systems and their replacement by a rule requiring such service only upon demand within the individual community. Alternatively, comment was sought upon either postponing rebuild beyond March 31, 1977 to a distant date certain or postponing compliance until each cable system individually undergoes "natural rebuild." We shall summarize the comments directed to each of these options in turn.

Comments

77. *Elimination.* Many cable television interests urged the elimination of the present mandatory requirements and the provision of access services, if at all, only upon documented demand for such services within the individual community. The National Cable Televi- [319] sion Association argues that when the costs of compliance are measured against the supposed public interest benefits to be derived, the rules cannot be justified. It argues that public demand for such services as well as the revenue to be derived therefrom are negligible, and rate increases to finance technologically unnecessary rebuild are impossible to obtain. The Community Antenna Television Association and

Midwest Video favor the elimination of the Commission's rebuild requirements, arguing that their imposition is beyond the Commission's jurisdiction and constitutes government taking without due process in violation of the Fifth Amendment to the Constitution. Other parties argue that these requirements create substantial barriers to entry thereby slowing the expansion of cable service to the public in general.

78. Not all parties favoring the elimination of the present requirements were system operators. Various parties urged the Commission to permit states or local authorities to set rebuild obligations which it is argued could more easily be tailored to the individual needs of communities. For example, in supporting the Commission's decision to cancel the March 31, 1977 deadline, the Cable Television Committee of the City of Berkeley favored complete elimination of federal requirements and their replacement by local standards. The proposal that the Commission adopt a more restricted role and that federal rules be replaced by local requirements is mirrored in comments filed by Publicable, various members of the Cable Television Information Center of the Urban Institute and the Virginia Public Telecommunications Council, the lattermost urging an increased state role.

79. Other parties favored the retention or expansion of the Commission's requirements. Metromedia opposed all changes in the Commission's rebuild standards. Florida CATV urged a total federal preemption of access and rebuild matters. The National Black Media Coalition urged the maintenance of fed-

eral standards stating that "access channels for educational use are too important to be left to the vagaries of local franchising."

80. Those in opposition to any elimination of the Commission's rebuild requirement advance many different arguments. The United Church of Christ asserts that such action "would betray the expectations of hundreds of local franchising authorities, thousands of actual or potential users of access channels and literally millions of subscribers who have embraced CATV during the past three years relying on the Commission's . . . regulatory program." Opposing a trigger based upon demand, the Leon County Public Library asserts that difficulties in defining what constitutes demand would render the use of this criterion "grossly ineffective and in neglect of the public interest." Favoring a retention of our channel capacity requirements Broadband Communications, Inc., argues that a system not having additional channels available "can reasonably be expected to stifle or delay possible promising new applications of cable." Citing its efforts to provide 25 cable systems with its production of "A Time for Art," the Cable Arts Foundation opposes the elimination of the Commission's channel capacity and rebuild requirements. In a similar vein various educational authorities in the County of San Diego note that during the 1974-1975 school year 1736 hours of instructional programming were furnished [320] over the cable systems in the county and over 1/4 million dollars has been spent by

the school systems in developing the possibilities for educational access programming.

81. *Postponement.* Some parties urge that postponing the deadline for system reconstruction merely postpones the problem of compliance rather than resolving it. Other parties including the United Church of Christ, the New Jersey Coalition for Fair Broadcasting, the United States Catholic Conference, the National Association of Educational Broadcasters and the American Broadcasting Company urge that if postponement is necessary the Commission should postpone the deadline for no more than two to five years. In support of this view various educational authorities and public interest organizations point to the work and substantial expenditures which have been undertaken in their communities in preparing to use the access channels to be made available in 1977. Other parties, particularly various members of the San Diego school system, urge that any postponement of the Commission's requirements should be granted only on a case-by-case basis and then only to a date certain.

82. Opposing such an approach the Central California Communications Corporation argues that postponement to a date certain would merely repeat the Commission's prior mistake of selecting an arbitrary deadline and would involve the Commission in new projections which, it alleges, are bound to be as inaccurate as those made in the past. Also opposing any substantial postponement but for different reasons the Indiana Public Interest Research Group notes

that some cable systems pledged to local authorities to rebuild by 1977 and in reliance on these promises were granted rate increases by local governments to cover the costs of this reconstruction.

83. *Natural Rebuild.* Another option posed by our June 3rd *Notice* was to require compliance with our channel capacity requirements at such time as each individual system is rebuilt as a result of its natural obsolescence or because of necessary channel expansion to accommodate new services. Parties responding to our inquiry were urged to provide a definition of natural rebuild as well as their suggestions as to how such a requirement might be enforced.

84. A majority of the parties responding to our *Notice* favored the adoption of an approach tied to natural rebuild but disagreed on the means by which this approach could be implemented and enforced. A view shared by the Cable Arts Foundation, various members of the San Diego school system, as well as other parties would permit individual cable operators to postpone compliance until natural rebuild only if a specific construction schedule is provided to the Commission. Many of these parties also urge the Commission to require system operators to obtain comments of the franchising authority upon the adequacy of the reconstruction plan, and to require firm commitments on the part of system operators as to the date when reconstruction will be completed.

85. A different view is expressed by a group of 21 system operators and the Florida CATV Association. These parties, while favoring an approach tied to

natural rebuild, assert that no fixed date by which rebuild must be completed would be appropriate. In support of this view it is noted that while the average useful life of the component [321] parts which make up a cable system is between 10 and 15 years, the life cannot be uniformly calculated. These parties assert that "cable companies anticipate that an industry wide rebuild will occur naturally during the next 10-15 years." Rather than setting a uniform date many of these parties urge that monitoring to insure compliance with the Commission's technical standards will insure that technologically obsolete systems will be rebuilt.

86. Urging the adoption of an approach tied to natural rebuild, various members of the staff of the Cable Television Information Center of the Urban Institute suggest that compliance with our rules should be required within ten years of the date of any Commission decision to require rebuild for systems not previously on notice of our requirements. This ten year period it is argued "exceeds the customary equipment lifetime expectation used in the financial planning at the time of its installation." Comments filed by The American Civil Liberties Union also imply that the useful life of most equipment is between 8-10 years. A practical example of natural rebuild is also provided by Coldwater Cable Television which notes that it is in the process of upgrading its 12-channel capacity system to provide 30 to 35 channels and that at the present rate of expansion such rebuilding should be completed by 1980, e.g., 12 years after its initial amplifiers were installed.

87. Other parties assert that the adoption of an approach tied to the replacement of obsolescent parts is administratively unenforceable. An alternative suggested by several parties would be to link a system's rebuild requirement to the inauguration of pay entertainment programming on a cable system.

88. *Resolution.* Having reviewed the comments filed in response to this section of the *Notice* we have determined to adopt an approach which we believe combines the best aspects of natural rebuild and postponement to a date certain. Accordingly, we have determined to require systems with 3,500 or more subscribers to reconstruct and comply with our requirements within ten years. We have chosen this period because we believe that it corresponds to the time within which the vast majority of systems will, even absent our requirements, have completed natural rebuild.

89. In arriving at this result we have rejected the arguments of those who favor the complete elimination of our rebuild requirements. Our reasons for rejecting this approach are essentially the same as those which caused us to reject the arguments of those who opposed any channel capacity or access channel obligations whatsoever. We are mandated to encourage the larger and more effective use of radio in the public interest. Cable television with its potential to provide many channels of programming is an ideal medium to provide additional telecommunications services to the public. We would be derelict in our responsibilities to the public were we to sit by and do

nothing to insure that the expanded channel capability provided by cable television serves valid public interest objectives. Were we at this stage of cable's evolution to leave the provision of channel capacity and access services entirely to the marketplace, such action could have the practical effect of providing a barrier to the growth of access services as well as a disincentive to the furnishing of new services which we expect of [322] cable. We agree with the comments of those who assert that unless the cable operator has existing built-in capacity to provide access services, he may reasonably be expected to frustrate their provision. By requiring larger system operators to reconstruct and comply with our channel capacity requirements we hope also to foster the provision of such services in those communities which are served by old systems.

90. In promoting the beneficial uses of cable we recognize, however, an obligation to temper our expectations for the future with a realization of the economic realities of the present. We must insure that in formulating policies designed to facilitate the future provision of services, we do not create unreasonable barriers to the present expansion of cable in general. In setting for comment an option which would require old systems to meet our requirements upon natural rebuild we hoped to minimize the present cost to the cable system operator and the public while insuring that when reconstruction naturally occurred it would be accomplished in such a manner as to provide expanded capacity which would facilitate the provision of future services.

91. In our June 3 *Notice* we specifically requested parties to provide a definition of how natural rebuild might be defined and such a requirement enforced. Unfortunately the comments responding to this portion of our inquiry contained a paucity of suggestions or proposals by which we might define and enforce this concept. In addition, upon independent analysis we have been unable to formulate such a definition which while providing the requisite degree of certainty to cable operators of their obligations would not be unduly complex and administratively impossible to enforce. Systems vary in age, type and useful life of equipment as well as profitability. No one approach can take into account all these variables.[21]

92. Some parties have suggested that we in effect permit cable operators to define when natural rebuild will occur and pledge either to us or to local franchising authorities that upon completion of rebuild the expanded services required by our rules would be provided. We have closely considered this proposal but do not believe that its adoption would be appropriate. In order to administer such a provision equitably, guidelines or standards defining natural obsolescence would have to be established. Without such guidelines many franchising authorities might have insufficient resources to make informed judgment as to an equitable period for requiring rebuild,

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[21] For a discussion of the problems encountered in system reconstruction see paras. 6-10 of *Notice of Proposed Rulemaking in Docket 20508, supra.*

and a few cable operators might artificially retard rebuild in order to postpone the provision of expanded services required by our rules. The same difficulties encountered in formulating a definition of natural rebuild are encountered in attempting to establish these guidelines.

93. Some generalizations may however be made. The amplifiers and cable used to provide cable television service do have a limited useful life expectancy. The estimates provided in the comments indicate that amplifiers installed on old cable systems must in general be replaced sometime between 8 and 15 years after their initial installation. In general, these projections are in accord with our own estimates. Until the middle 1960's the amplifiers used in cable television systems employed vacuum tubes. These earlier amplifiers had in general a very [323] limited useful life span. In the mid 1960's up until approximately 1969-1970, the first generation of solid state single ended 12-channel capacity amplifiers were introduced. With the initial introduction of solid state components various problems were encountered, e.g., inadequate surge protection and accumulative heat. Though some of these amplifiers may last much longer, these problems, in general, necessitate the replacement of most first generation solid state components by the tenth to twelfth year after initial installation. With the refinements in technology which occurred in the very late 1960's and early 1970's push pull amplifiers were introduced which provide 20+ channel capacity by permitting the carriage of

midband and frequently super band channels. These amplifiers have, in general, a substantially longer useful life span.

94. Because the vast majority of systems constructed prior to 1972 were constructed with either vacuum tubes or single ended amplifiers with limited useful technological lives we would expect that many of these either have been replaced, or will be replaced, in the near future. Based upon the comments and our experience, we think that in the vast majority of situations a complete turnover of this older equipment will be accomplished naturally within ten years. Accordingly, we have determined to use this ten year standard in our rules. Those systems regardless of market location which have 3,500 or more subscribers shall be required to reconstruct their plant and distribution network in order to comply with our access and channel capacity requirements and to complete such reconstruction within ten years of the date of this decision.

95. We recognize that this reconstruction will in many cases be accomplished prior to our deadline and that a few systems may in fact have to reconstruct to meet our technical requirements. We recognize also that the selection of any time frame is to a certain extent arbitrary. We have chosen the ten year period, however, based upon our belief that it represents a liberal estimate of the reasonable time within which the vast majority of systems will be naturally rebuilt. By framing our requirements to correspond to the time within which the vast majority of sys-

tems will be rebuilt, even without our requirements, we have insured that such rebuilding will be accomplished with components which will allow for the future expansion of services without presenting an artificial inflationary burden to system operators which must ultimately be borne by the public.

96. Those systems with 3,500 or more subscribers located in major television markets have been on notice since 1972 of rebuild obligations. By extending our deadline for such systems we have substantially mitigated the burdens placed on them. Those systems with 3,500 or more subscribers outside of the major markets were not previously subject to any rebuild requirements. Our reasons for extending our rebuild requirements to these systems are identical to our reasons discussed earlier, for altering the criteria upon which we impose our access obligations in general. Moreover, we do not believe that our extension of rebuild requirements to these systems will be substantially burdensome. The earliest cable systems were generally constructed in communities which could not obtain adequate over-the-air television coverage. Most of these communities are outside the major television markets. In some such communities the only television ser- [324] vice that is generally available is that provided by the cable system and such systems are financially strong as well, free by virtue of their locations, from some of those incentives that might induce other systems to upgrade the quality of the service they offer. Moreover, because many such systems were in fact constructed some time ago, re-

construction may naturally be expected to occur earlier than for other systems that were constructed later in the less desirable cable markets. Accordingly, we believe our ten-year reconstruction deadline is also appropriate for these cable systems. Should the imposition of this requirement prove unduly burdensome in some isolated instances we shall treat such matters on an individual basis and, if appropriate, grant relief.[22]

The Role of the Local Franchising Authority

97. Under our prior rules, local authorities, in those communities where our rules did not apply, were permitted to adopt their own channel capacity and access channel requirement provided that these requirements were not in excess of those we had adopted for major market systems. See Sections 76.251(a)(11)(iv) and 76.251(b). While the reasons that have caused us to remove our requirements from smaller systems in the major markets might suggest the need to preclude their imposition by local authorities, we believe that room remains for local authorities to exercise their own best judgment in

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[22] We recognize that a particular problem may be encountered if there are 12 channel systems presently under construction outside of the major television markets which will eventually attain 3,500 subscribers. These systems were not formerly subject to this requirement and should therefore be given some fair margin to complete work in progress. If such systems do go into operation prior to March 31, 1977, they will be given 10 years within which to reconstruct and provide 20 channel and two-way capacity. (See Section 76.252(b))

balancing between the needs of their citizens and the costs which must ultimately be borne by them. Accordingly, with respect to systems with under 3,500 subscribers, we will not preclude local authorities from mandating channel capacity and access obligations as long as these do not exceed what our rules require of systems with 3,500 or more subscribers.

98. In addition, even for systems with more than 3,500 subscribers, we are generally prepared to see local requirements continue in effect if they do not exceed the twenty channel, two-way and four dedicated channel concepts in our rules, even if the timing on system rebuild is shorter than our own, or there is a local requirement that converters be installed to activate all of the dedicated channels, provided it can be shown that such local requirements are based on a reasoned analysis of the costs and needs for the services involved and that they will not interfere with compliance with federal obligations. However, we believe that all such obligation [sic] in excess of the rules adopted herein, if they are to be continued, should be subject to review in light of the revisions we have made in our rules because many of these requirements were adopted in reliance on our rules and without independent evaluation of them.

99. Accordingly, we shall continue to allow the imposition of local requirements which do not exceed our own. Lesser local requirements will also not be foreclosed, although for systems with over 3,500 subscribers, these would be superseded by our own rules. Local require- [325] ments which do exceed our own,

may also be permitted upon individual showings and with Commission approval. Such showings will be considered in the certification process for those systems not yet certified and for those systems seeking recertification by March 31, 1977. Other situations will be considered pursuant to the special relief provisions of Section 76.7 of the rules. In the absence of such showings, provisions exceeding our own will be considered to have no force or effect in accordance with the procedures adopted in the *Report and Order in Docket 20272*, FCC 75-897, 54 FCC 2d 855 (1975). In those situations where such showings were made and accepted under prior rules they need not be repeated and our rulings thereon will continue in effect.

100. Petitions to justify access or rebuild requirements in excess of those we are adopting today should indicate the number of channels available to provide access programming without imposing these additional requirements and how these channels are insufficient to meet demonstrated need within the community or communities. In addition, such showings should include estimates of the expected expenses involved in complying with these additional requirements, how these expenses will contribute to the quality of cable service in the community and what the effect of those expenses will be upon the financial viability of the system. To the extent that a system has pledged to comply with our prior requirements and as a result of such pledge been granted a rate increase, this also is a relevant factor in deciding whether to permit the enforcement of such a provi-

sion. It is only with a complete showing of this nature that we can realistically determine if additional rebuild or access requirements are justified, and they will not adversely affect the operator's ability to accomplish federal objectives.

Additional Matters

101. In addition to those comments already discussed, various parties advance other observations. The Ohio Educational Television Network urges, for example, the maintenance of the policy we announced in our *Notice* not to postpone rebuild requirements for those systems which do not have sufficient activated channel capacity to provide full time carriage for those television stations which are "must carry" under our rules. In support of this view OETN cites difficulties which it has encountered in obtaining carriage of "must carry" educational television stations which have within the recent past either begun broadcasting or increased transmitter power.

102. We recognize that this is a serious problem and that many of the same difficulties encountered in requiring cable systems to reconstruct to meet our channel capacity and access obligations are encountered when requiring systems to reconstruct to provide full time carriage to "must carry" stations. Clearly there are equities and public interest considerations on both sides of this situation. A television station which newly goes on the air or increases its transmitter power should be carried by a cable system operating within its area of service. On the other hand a cable system which constructs its distribution network with sufficient activated capability to provide full time carriage to all existing "must carry" stations should not, perhaps, be required to immediately reconstruct its distribution network and in-

[326] stall converters in each subscriber's home merely because one new station goes on the air or increases its transmitter power. We do not intend to finally resolve this matter in this proceeding which, as we have noted, is concerned with the channel capacity and access requirements formerly contained in Section 76.251. We shall, however, continue to analyze this area and if appropriate take further action.

103. While the majority of parties filing comments in this proceeding recognize the reasons which cause us to cancel the March 31, 1977 reconstruction deadline, a few organizations urged its reinstatement. Some of these parties also oppose our decision to separate the issues contained in *Docket 20363* from those under consideration in this proceeding. Additionally, it is argued that instead of reducing our channel capacity and access channel requirements in view of economic considerations, the Commission should increase the signal carriage available to cable television systems which will lead to the acquisition of new subscribers and an improved financial picture for the industry in general. In opposition to this suggestion, various broadcast interests argue that in view of the failure of the cable television industry to rebuild, that the entire area of signal carriage should be revisited with an eye toward adopting more restrictive limitations.

104. We have previously set out the reasons which caused us to cancel the March 31, 1977 deadline in our *Report and Order in Docket 20363, supra*, as well as the reasons which have led us to separate the issues in that docket from the issues herein under review.[23] The difficulties which we have encountered in formulating an equitable rebuild plan as well as the difficulties encountered in determining the appropriate approach to take with respect to other areas of this *Notice* have reaffirmed our belief in the wisdom of both decisions.

105. Moreover, the public interest objectives which have caused us to impose channel capacity and access channel requirements on larger cable systems are to a certain extent, different than the reasons which caused us to set various limitations on the amount of product available to cable systems in general. In the former case we seek to promote the expansion of communications services as well as the expansion of the public's access thereto, while in the latter we seek to insure that the interest of the public in maintaining a healthy commercial television structure will not be undermined. Although there is some relationship between the two considerations, each must be considered on its merits. In either case, when it appears, based upon our experience in administering our rules, that they are unnecessarily burdensome and do not further the objectives for which they are designed,

[23] See Footnote 2 in *Report and Order in Docket 20363, supra*, and Footnote 2 in *Notice of Proposed Rulemaking in Docket 20508, supra*.

we change them. Such is the case with respect to the channel capacity access channel and rebuild requirements under review today. Recently, such has also been the case with respect to various aspects of our signal carriage and subscription rules.[24]

[327] Authority for the amendments to the rules adopted in the Appendix attached hereto is contained in Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, 309, 315 and 317 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That Part 76 of the Commision's Rules and Regulations IS AMENDED, effective June 21, 1976, as set forth in the Appendix attached. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[24] For example, the Commission has recently made substantial modification to its rules applicable to specialty stations, *Report and Order in Docket 20553*, FCC 76-189, —— FCC 2d —— (1976); eliminated its leapfrogging restrictions, *Report and Order in Docket 20487*, FCC 75-1409, 57 FCC 2d 625, eliminated its ban on the subscription presentation of series programming, *Second Report and Order in Docket No. 19554*, FCC 75-1218 —— FCC 2d —— (1975), all of which increase the product available to cable television systems, hence the public, without undermining the conventional television structure.

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§ 76.13 [Amended]

1. In § 76.13, paragraphs (a)(4), (b)(4), and (c)(3) are amended to delete "§§ 76.251 and 76.253" after the words "provisions of" and substitute "§§ 76.252, 76.254, 76.256, and 76.258".

§ 76.251 [Deleted]

2. Section 76.251 is deleted.

3. A new Section 76.252 is added, as follows:

§ 76.252 *Channel capacity.*

(a) Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3,500 or more subscribers, or any system having 3,500 or more subscribers which is not part-of such a system conglomerate, shall comply with the following requirements respecting channel capacity:

(1) *Minimum channel capacity.* Each such system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered.

(2) *Two-way communications.* Each such system shall maintain a plant having technical capacity for nonvoice return communications.

(b) This section applies to all cable television systems that commence operations on or after March 31, 1972, in a community located in whole or in part within a major television market. Systems which commence operations after March 31, 1977 in a community located outside of a major television market shall comply upon commencement of operations. All other systems shall comply on or before June 21, 1986. Systems that are in compliance with the provisions of subparagraph (a)(1) of this section on or before June 21, 1976 are not required to modify their facilities in order to comply with subparagraph (a)(2) of this section.

§ 76.253 [Deleted]

4. Section 76.253 is deleted.

5. A new Section 76.254 is added, as follows:

§ 76.254 *Number and designation of access channels.*

Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3,500 or more subscribers, or any system having 3,500 or more subscribers which is not part of such a system conglomerate, shall comply with the following requirements respecting the number and designation of access channels:

(a) Each such system shall, to the extent of its available activated channel capability, comply with the following requirements:

(1) *Public access channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis;

(2) *Education access channel.* Each such system shall maintain at least one specially designated channel for use by local educational authorities;

(3) *Local government access channel.* Each such system shall maintain at least one specially designated channel for local government uses;

(4) *Leased access channel.* Each such system shall maintain at least one specially designated channel for leased access uses. In addition, other portions of its nonbroadcast bandwidth, including unused portions of the specially designated channels, shall be available for leased uses. On at least one of the leased channels, priority shall be given part-time users.

(b) Until such time as there is demand for each channel full-time for its designated use, public, educational, government, and leased access channel programming may [328] be combined on one or more cable channels. To the extent time is available therefore, access channels may also be used for other broadcast and nonbroadcast services.

(c) Each such system shall, in any case, maintain at least one full channel for shared access programming: *Provided, however,* That, in the case of systems in operation on June 21, 1976 if insufficient activated channel capability is available to provide one full channel for shared access programming it shall provide whatever portions of channels are available for such purposes. Each such system in meeting its access obligations shall make reasonable efforts in programming its bandwidth to avoid the displacement of access service.

(d) Whenever any of the channels described in paragraph (a) or (c) of this section is in use during 80 percent of the weekdays (Monday-Friday) for 80 percent of the time during any consecutive three-hour period for six consecutive weeks, such system shall have six months in which to make a new channel available for the same purposes: *Provided, however,* That the channel expansion mandated by this paragraph shall not exceed the activated channel capability of the system.

(e) Each such system shall make available all other unused channels, in addition to those which are part of the system's activated channel capability, for the purposes specified in paragraph (a): *Provided, however,* That in making available such additional channels the system operator shall be under no obligation to install converters.

(f) Until March 31, 1977, systems outside the major television markets and systems that commenced operation prior to March 31, 1972 may comply with the requirements of this section by making a reasonable effort to provide channel time for local non-operator presentation of cablecast programs.

6. A new Section 76.256 is added, as follows:

§ 76.256 *Access services.*

Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3,500 or more subscribers, or any system having 3,500 or more subscribers which is not part of such a system conglomerate, shall comply with the following requirements respecting, the provision of access services:

(a) *Equipment requirement.* Each such system shall have available equipment for local production and presentation of cablecast programs other than automated services and permit its use for the production and presentation of public access programs. No such system shall enter into any contract, arrangement, or lease for use of its cablecasting equipment which prevents or inhibits the use of such equipment for a substantial portion of time for public access programming.

(b) *Program content control.* Each such system shall have no control over the content of access cablecast programs, however, this limitation shall not prevent it from

taking appropriate steps to insure compliance with the operating rules described in paragraph (d) of this section.

(c) *Assessment of costs.*

(1) The channels described in § 76.254 (a)(2) and (a)(3) shall be made available free of charge until five (5) years after the system first offers channel time for such cablecasting purpose.

(2) One of the public access channels described in Section 76.254(a)(1) shall always be made available without charge.

(3) Charges for equipment, personnel, and production of public access programming shall be reasonable and consistent with the goal of affording users a low-cost means of television access. No charges shall be made for live public access programs not exceeding five minutes in length.

NOTE: Systems outside the major television markets and systems that commenced operations prior to March 31, 1972 are not required to provide any free production facilities prior to March 31, 1977.

(d) *Operating rules.*

(1) For public access programming, such systems shall establish rules requiring first-come, nondiscriminatory ac-

cess; prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

[329] (2) For educational access programming, such system shall establish rules prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively) and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

(3) For leased access programming, such system shall establish rules requiring first-come, nondiscriminatory access;

prohibiting the presentation of lottery information and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); requiring sponsorship identification (see § 76.221); specifying an appropriate rate schedule; and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting time. Such a record shall be retained for a period of two years.

(4) The operating rules governing public, educational, and leased access programming shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection as provided in § 76.305(b). Except on Commission authorization, or with respect to local government access programming, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels.

NOTE—Nothing in this section shall be construed as limiting the authority of state and local entitles to regulate two-way, point-to-point, intrastate non-video cable transmissions.

7. A new Section 76.258 is added, as follows:

§ 76.258 *Non-federal access regulation; voluntary access.*

No cable television system shall be required by a state or local entity to exceed the provisions of §§ 76.252, 76.254, and 76.256 concerning channel capacity, activated channel capability, and equipment, absent Commission authorization, even if such a system has previously been certificated, pursuant to § 76.11, based on proposals or operations in excess of these provisions. If a conglomerate of commonly-owned and technically-integrated cable television systems having a total of fewer than 3,500 subscribers, or any system having fewer than 3,500 subscribers which is not part of such a system conglomerate, provides access services, it shall comply with the provisions of § 76.256(b) and (d).

8. In § 76.305, paragraph (a)(7) is revised to read as follows and paragraph (c) is amended to delete "Section 76.205(c), 76.251(a)(11), and 76.311(f)" after the words "periods specified in" and substitute "§ 76.95(d), 76.205(c), 76.221(f), 76.225(a), 76.256(d), and 76.311(f)."

§ 76.305 *Records to be maintained locally by cable television systems for public inspection.*

(a) * * *

(7) A copy of all records which are required to be kept by § 76.95(d) (network program nonduplication private agreements); § 76.205(c) (origination cablecasts by candidates for public office); § 76.221(f) (sponsorship identification); § 76.225(a) (subscription cablecasting); § 76.256(d)

(operating rules for access channels); § 76.311(f) (equal employment opportunities);

* * * *

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

In Re: Cable Television Channel Capacity and Access Channel Requirements (Docket No. 20508)

Somewhere along the way to the "wired nation," something went haywire and this action takes cognizance of the lot of shortcircuited expectations. Because we cannot expect blood from a turnip, I concur in the main with the substantive rule changes herein which lower our expectations to more realistic levels under today's economic and technological conditions. Arguing over the nits and gnats of these new access requirements would be unavailing when it is the concept of *unlimited* access on which most adherents fixed their sights.

[330] However, I dissent to the postponement of the effective date of these revised standards for an entire decade. Just as we were unable to predict five years ago what the conditions would be in 1977, we are unable to foresee what conditions will be like in the next several years when the income to the cable systems from pay TV and savings from recent reregulation efforts are available. Thus, I am in accord with the suggestion of the United Church of Christ and others that our deferment should be of shorter duration, perhaps three years, when we could again review this matter.

Concurring Statement of Commissioner Abbott Washburn—Docket 20508

While I am in agreement that the decision by the majority represents a reasonable approach to the 1977 rebuild requirements, I have some concern about the 3,500 subscriber cut-off for channel capacity and two-way capability. I would have preferred to see a requirement that all systems of 1,000 or more subscribers be built with 20 channel capacity and two-way capability. As Metromedia Corp. pointed out in their comments,[1] a system's channel capacity is most likely determined prior to the time the first subscriber is signed up and, therefore, a triggering number of subscribers leaves the operator unable to determine his responsibilities. Of course to the extent that builders of new systems anticipate a system size of 3,500 or more subscribers they will include 20 channel capacity and two-way capability in their building plans.

Abundant channel capacity and two-way capability are essential to the development of services to subscribers which have always been associated with the long-range "promise" of cable-TV. I would therefore encourage builders and rebuilders of systems of any size to include 20 channel capacity and two-way capability in their construction plans.

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[1] See paragraph 28.

Concurring Statement of Commissioner Glen O. Robinson

I concur in the Commission's action today in modifying its 1972 capacity, access channel and related requirements. The requirements were the product of expectations generated in cable's go-go years when the benefits of cable were sold as peddlers once sold Lydia Pinkham's Vegetable Compound, a veritable elixer for the ills of our time. The booster years have (for the most part) passed. With them have passed some of the unrealistic expectations built upon them—among others our 1972 requirements for channel capacity, access and program origination services which the Commission wisely recognizes could not possibly be met in its original timetable without producing drastic damage to the financial structure of the industry and placing serious obstacles in the way of future development.

I would go somewhat further than the majority in removing the burdens of the 1972 rules. In an earlier Commission action modifying the program origination requirements, I doubted the wisdom of requiring the development of physical plant anterior to any evidence that this capital would ever be productively employed. See, *Cable Televi-* [331] *sion Service*, 49 FCC 2d 1090, 1111 (1974) (separate statement). I still do.

My doubts apply as well to the requirement of access channels.[1] As I said at the outset of this pro-

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[1] In contrast to the free access channels, the provisions requiring availability of leased channels do not involve any

ceeding, *Cable Television Channel Capacity*, 53 FCC 2d 782, 789 (1975), I do not think the case for these requirements, particularly those commanding free access channels, has been made. I would not rule out the possibility that at some point in the future of cable some provision for access channels might reasonably be commanded, on the theory, I suppose, that this is a "merit good" whose provision ought not to be left to market determination.[2] However, given the very light demand for access channels, I continue to question our requirement for free access channels at this time. I fully concede that the issue is less than a burning one inasmuch as the Commission has removed most of the burden of its 1972 access requirements. Nevertheless, so long as the requirement en-

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subsidy element; regulation here is presumably intended to correct a local system's incentives, as a monopolist, to restrict the supply of its product. Earlier, I questioned whether such a correction was practically necessary in this situation. However, insofar as our requirements go no further than to compel the system to respond to demand *as it is manifested* (and not as we foresee it years in the future), I accept it as possibly beneficial and, at worst, harmless.

[2] Earlier I suggested "merit goods" were those "which like spinach and Latin lessons are 'good' for us and which we should have—whether or not we want them bad enough to pay for them." 53 FCC 2d 800. I have since been informed that the spinach illustration is a poor one since its ancient esteem as a source of dietary iron has been destroyed by modern biochemistry. This exposes a central problem with merit goods: who decides whether and in what degree they are, in fact, meritorious?

tails some cost[3]—if only just the opportunity cost of other possible uses of the channel—I think we ought to declare a moratorium on the requirement until we see what a fully mature cable industry looks like.

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[3] Free access, like other forms of "free" lunch, must, of course, be paid for by someone, but it is in the nature of such goods that they are not wholly paid for by those who consume them. The present illustration is no exception. The costs will no doubt be borne partly by cable entrepreneurs and partly by subscribers most of whom, judging from current evidence, will not use or view the access channels.

APPENDIX C

F.C.C. 76-1122

[62 F.C.C. 2d 399]

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20508

IN THE MATTER OF AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE CABLE TELEVISION CHANNEL CAPACITY AND ACCESS CHANNEL REQUIREMENTS OF SECTION 76.251

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

(Adopted: November 30, 1976;

Released: December 21, 1976)

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONERS HOOKS AND WASHBURN CONCURRING IN THE RESULT; COMMISSIONER WHITE CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER FOGARTY JOINS.

1. On April 1, 1976, the Commission adopted its *Report and Order in Docket 20508*, FCC 76-313, 59 FCC 2d 294 (1976), terminating an extensive rulemaking proceeding concerning cable television channel capacity and access channel requirements. Following its release, petitions were received urging that reconsideration be given to several of the newly adopted changes. Two parties filed statements supporting the petitions, and one response also was received.

2. In 1972 the Commission set out to guarantee a realization of cable television's promised potential by adopting a comprehensive scheme for the regulation of cable television systems throughout the nation, including a framework for the development and use of access and nonbroadcast channels. In part, it required cable systems located within major television markets to possess a fixed minimum channel capacity of at least 20 channels with a capability to expand should additional channels be needed for specifically designated access purposes.[1] The guiding principle was that the Commission ". . . must make [400] an effort to ensure the development of sufficient channel availability on all new CATV systems to serve specific

[1] See *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, paras. 117 through 127 (1972).

recognized functions." [2] Systems in operation before the rules were adopted were required to come into full compliance with these standards by reconstructing their plant and distribution networks within five years—that is, by March 31, 1977. By 1975 the Commission recognized that this initial regulatory framework imposed an undue financial burden on many cable system operators. Thus, the 1977 deadline was canceled [3] and this proceeding initiated to inquire into alternative methods of obtaining access channels on older systems within recognized economic restrictions, and to inquire into channel capacity and access requirements for old and new systems.[4]

3. Briefly, the rules now require larger cable systems (3500 or more subscribers) to have available for potential use a minimum channel capacity of 20 channels and two-way capability. "Old (pre-1972) systems" are given ten years, or until their "natural rebuild," within which to meet the requirements. In addition four dedicated access channels continue to be required, if activated channel capability is available and demand exists for their full time use. Otherwise, one "composite" channel or "blackout" time—where a duplicating program is blacked out to protect another station—may be used to fulfill the access obli-

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[2] *Second Further Notice of Proposed Rulemaking in Docket 18397-A*, FCC 70-676, 24 FCC 2d 580, 587 (1970).

[3] *Report and Order in Docket 20363*, FCC 75-821, 54 FCC 2d 207 (1975).

[4] *Notice of Proposed Rulemaking in Docket 20508*, FCC 75-644, 53 FCC 2d 782 (1975).

gations. While the Commission "in no case" will require rebuilding or the installation of converters solely to provide channel space for access services, system operators may not "exclude a potential access user who intends to . . . install a converter himself." These rules form the basis for three of the reconsideration petitions.

4. Several staff members of the Cable Television Information Center argue that the *Report and Order* represents an "ill considered" and fundamental reversal of long standing Commission policy relating to access programming. Their assertions are contained in a "Petition for Reconsideration," supported by the Alternate Media Center at the New York University School of the Arts, and the New York State Commission on Cable Television. In particular, CTIC views two new policies as unsound: (1) provision of an access channel only when there is sufficient activated capacity, and (2) no requirement that converters be provided to meet access requirements even if demonstrated use and need can be established. CTIC's position is premised on the proposition that without multiple channel availability, stimulation, development, and diversity of access programming is impossible, a proposition, it argues, the Commission asserted in the *Cable Television Report and Order*, *supra*, at para. 120, the *Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 478 at para. 79 (1972) and the *Clarification of Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175 at para. 13 (1974). Not only do the new rules

implement a policy of "limited availability" but the burden of providing additional channel capacity (financing and obtaining special relief from the Commission) has been shifted from the cable operator to the potential channel users, who lack the requisite financial resources, and [401] the local franchising authorities, who generally lack the expertise needed to produce an acceptable showing of special relief. CTIC concludes that cable's strength rests in its surplus channel capacity and its availability to all potential users. Upon reconsideration, the Commission is urged to adopt three policies: a) Require at least one composite access channel on all large (over 3500 subscriber) systems, subject to a waiver if the operator demonstrates that compliance would result in financial hardship; b) Permit delivered channel capacity to be the subject of negotiation between the cable operator and the franchising authority without Commission review; and, c) Require limited access to medium-sized (1000-3500 subscriber) systems.

5. The National Cable Television Association together with the California Cable Television Association responded[5] to CTIC's petition, specifically addressing each of the three proposals and urging rejection of the petition. Larger systems should not be required to provide at least one complete access channel, they argue, because of the undue financial bur-

[5] The "Response to Petition for Reconsideration" was late filed, but accompanied by a "Motion to Accept Late Filing" due to an unexpected delay in normal delivery service. The motion is hereby granted.

den it imposes, the limited nature of the exemption, and the impending need to rebuild systems to accommodate new services. Local authorities should be preempted from imposing stricter access requirements than the Commission's because past experience has demonstrated the imposition of abusive and unjustified requirements. Finally, access requirements should not be reimposed on medium sized systems because these are the systems already burdened by overregulation and for which additional financial requirements in the form of converters "would not be minimal." NCTA and CCTA conclude by stating that the Commission has reaffirmed rather than reversed its prior policy and that the burden of proof logically has been placed on the party who seeks a waiver of the existing rules.

6. There should be no mistake regarding the Commission's continuing commitment to the provision of access services and channels. However, as we stated in the *Report and Order*, this is a very difficult area. Since adoption of the initial access rules in 1972, the Commission has accumulated, through experience and comments, much information regarding the public benefits and corresponding costs of access. Our general reevaluation of the 1972 rules was not intended to reverse our position and the resulting modifications do not constitute such an action.[6] Instead the *Report and Order* is a recognition that certain limitations

[6] In fact, preliminary findings indicate that more cable subscribers will be affected by the new rules than were by the old ones, because of their extension to smaller markets.

exist which make imposition of the original requirements unduly burdensome, ultimately impairing total cable television service to the public. Therefore, modifications were adopted revising the obligations in part and delaying their effective date.

7. We reject CTIC's first proposal, that every system with 3500 or more subscribers have one full composite access channel, for the reasons stated in the *Report and Order* when we determined to modify our original mandatory expansion requirement.[7] At that time we reviewed the cost of converter installation and the corresponding benefits. Our conclusion was that the costs involved when weighed against the potential benefits were unreasonable. And it should be emphasized [402] here that we are concerned not just with the costs to the system operator but also with those costs which must in the long run be passed on to subscribers. The CTIC staff petition has not convinced us that our original decision was in error or that the burden should be cast on the system operator in each instance to show that provision of the channel would be unduly burdensome. It should be emphasized, however, that the rule applicable to new systems commencing operation are somewhat more restrictive and do require that at least one channel be available for access purposes. See Section 76.254(c). Older systems are exempted from the requirement only if they lack sufficient channel capacity to provide a full channel and even those systems without full channels available are required to accommodate access programming on nonduplication "blackout" time on channels otherwise carrying broadcast signals.

[7] See discussion beginning at paragraph 58.

8. The CTIC staff's second proposal goes to the question of whether local authorities should be permitted to require channel capacity and access obligations beyond those contained in the Commission's Rules. We expressed the belief in the *Report and Order* that excessive burdens dictated by local authorities created no less an undue strain on system operators and cable subscribers than those imposed by the Commission. We did provide, however, that local authorities could require services and facilities beyond those required by the Commission when the need for such additional facilities could be documented and the costs imposed have a rational relationship to the likely benefits that cable subscribers will receive. The procedures to be followed in justifying such additional requirements are specified in paragraphs 97-100 of the *Report and Order*. We recognize that this procedure cast some burden on the franchise authority to present concrete data on costs and proposed channel uses, but we do not feel this is inappropriate in that this is a burden of analysis which should already have been assumed for purposes of making the decision to require the additional channels or services.[8] To the extent such obligations are being imposed to provide channels for services, the particulars of which are unknown, we believe this imposes a burden which cannot be justified. We do recognize, of

[8] In this respect, see *Arlington Telecommunications Corporation*, FCC 75-670, 53 FCC 2d 757 (1975); and *Total Communications of Irving, Inc.*, FCC 74-157, 45 FCC 2d 525 (1974).

course, that there may be instances where cities may wish to impose contingent obligations. That is, for example, having budgeted or planned for the completion of an educational or governmental telecommunications facility some time in the future a city may want to require a cable television distribution capacity for the facility's programming. A present requirement for such a capacity would be hard to justify but that would not preclude our acceptance of a contingent term in a cable system franchise under the procedures specified in the *Report and Order*. Properly documented requests have been granted by the Commission in the past and should receive our sympathetic consideration in the future. Additionally, we reiterate our acquiescence in voluntary actions taken by cable operators to provide access services in excess of federal standards. Although channel capacity and access channel regulations have been preempted, prohibiting mandatory franchise terms more burdensome than the Commission's, we refer to our statement in *Comcast Cable of Paducah*, FCC 76-965, —— [403] FCC 2d —— (1976), that "no Commission Rule or Regulation would prohibit a cable system from voluntarily providing . . . access services in excess of Commission requirements," so long as any such commitment by the cable operator is "made in a genuinely voluntary atmosphere."

9. The last of CTIC's proposals is for a multi-tiered approach to the access channels, with systems of between 1000 and 3500 subscribers being required to provide some access channels for use by groups with their own production equipment but with no requirement that the system itself have any production capability. We considered the adoption of such an approach in the *Report and Order* and decided not to adopt it in an effort to simplify an already complex set of rules and in view of the burdens such obligations could impose on smaller systems. Nothing presented in the CTIC petition persuades us now to alter that judgment. We would expect, however, that all systems that have unused channel space available which others wish to use for public, educational, governmental, or leased purposes would cooperate fully and make channel space available. It is, generally, to the cable system operator's advantage to fill up his available channels by whatever means are available. If instances do come to light where non-operator use of otherwise unused channels is denied without explanations, we hope these will be brought to our attention so that further consideration can be given to rule changes in this area. Our present experience has been, however, that even larger systems typically have difficulty finding access channel users so this problem with smaller systems is not likely to arise with any frequency. It should also be noted that local authorities are free to impose requirements of their own on such systems as long as those requirements do not exceed those in our rules. See Section 76.258 of the Rules.

10. Several cable television companies, in a "Joint Petition for Partial Reconsideration," [9] also urge the

[9] The joint cable television operating companies are: Coachella Valley Television; Colony Communications, Inc.; Complete

Commission to reconsider its position with regard to the role of local franchising authorities. They argue that a rollback of federal obligations may be ineffectual when local authorities are permitted to impose their own standards and that this "dual jurisdictional" approach places operators between the Commission and the local authorities, making them agents of the Commission where authorities refuse to recognize the Commission's paramount authority. They suggest a halt to city waivers based upon a "reasoned analysis," and ask instead that the Commission impose a complete moratorium on any local or state consideration of access or rebuild requirements until after a system obtains renewal or franchise amendments required to meet the 1977 filing requirements.[10] Both the NCTA and the CCTA make similar arguments in their "Petition for Reconsideration." As stated in response to CTIC's proposal, we have determined to maintain our preemption in this area, but with a recognition that local circumstances may justify access standards other than those we have dictated. These local standards will not be approved [404] except upon a detailed showing as discussed at

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Channel TV, Inc.; Cox Cable Communications, Inc.; Gulf Coast Television, Inc.; Sammons Communications, Inc.; Sioux Falls Cable Television; Televents Affiliated Systems; and The TM Communication Company.

[10] The length of such a moratorium has been rendered indefinite by our action in Docket 21002, FCC 76-1070, generally reviewing the franchise requirements, and this is another reason for not adopting such a freeze.

paragraph 100 of the *Report and Order*. Abuses may occur, but we anticipate no widespread problems that cannot be dealt with on an individual basis once they are brought to our attention.

11. The reconsideration petitions of NCTA and CCTA, and the several cable companies, also suggest that adoption of the "third party user" rule, whereby access is guaranteed to a potential user willing to install converters, constitutes a major policy decision made without proper notice, explanation, or comments.[11] The primary problem, they assert, is that guaranteed access for third party users transforms cable operators into common carriers, a status the Commission previously has refused to confer upon cable television. These arguments closely parallel those raised by Midwest Video Corporation in its appeal of the Commission's adoption of Section 76.253 in the *Report and Order in Docket 19988*, FCC 74-1279, 49 FCC 2d 1090 (1974), and in this proceeding. Our decision to reject the claims is based on a belief that the adopted regulations reasonably relate to our regulation of cable television pursuant to the objectives of the Communications Act of 1934, as amended.[12] Cable television is a "hybrid" industry, characterized both by broadcast and common carrier traits. As we stated at paragraph 17 of the *Report and Order*:

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[11] See *Report and Order* at para. 66.

[12] See also, *TM Communications Company*, FCC 76-966, —— FCC 2d —— (1976).

> So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow "common carrier" in nature.

12. NCTA and CCTA also pose a somewhat more practical question with respect to a third party user's right to interconnect on a cable system. They argue that problems concerning installation and maintenance may interfere with the quality of service provided to subscribers. The Commission is aware that such problems may occur. Although we speak of a "guaranteed right" of access by third party users, we do not mean so unqualified a right that a cable operator is compelled to accept the installation of inferior equipment or improper service which will result in harm to his system. On the other hand, it is the operator's responsibility to demonstrate, well beyond mere allegations, that proper service will be impeded with the addition of another's equipment. In those instances where time or experience is necessary to determine the effects of additional equipment we expect the operator to make available that opportunity.[13] The burden is on the operator to show harm rather than on the user to prove the absence of harm.

13. Finally NCTA and CCTA argue that required utilization of the last available channel for access

[13] We recognize however, that posting bond may be appropriate if installation and testing is necessary to determine whether "harm" will occur.

services discriminates against pay television programming, and also runs counter to the Commission's policy of requiring dedicated access channels only when actual demand can be demonstrated. We have stated repeatedly our commitment to the provision of access services. Even so, we have reduced the burden on cable operators so that they may fulfill their obligations with the provision of only one access channel. However, we believe access pro- [405] gramming should continue to have priority status over operator-originated programming where they compete for the final available channel on a cable system. At paragraph 68 of the *Report and Order* we resolved this question by stating: "While we shall continue to encourage operators to originate, we do not believe that the public interest will be served if such efforts are at the expense of others who wish to provide access programming." [14]

14. A final issue for reconsideration is submitted by Community Communications Project of New Paltz, Inc., located in New Paltz, New York. Community asserts that minimum equipment requirements for access channels should be specifically designated. For access service to develop Community believes the signal emanating from the access facilities must be comparable to that of other signals carried on the cable

[14] The priority afforded access under this policy is not inconsistent with the "demand" basis for channel commitment. It simply recognizes that demand is unlikely to develop if all channel space is filled, and that even if demand did develop it would not likely be met if programming had to be "bumped."

system. Although we are not prepared to dictate equipment standards at this time, we do intend to monitor the situation to make sure that access is not being defeated by poor technical quality. If we determine that standards are required to insure the development of access services, we will take appropriate action.

15. Apart from the several issues noted as proposed grounds for reconsideration, the Commission has received numerous inquiries seeking clarification of various sections of the new rules. Thus, it is appropriate to review these sections to make clear our expectations for their implementation.

(a) *Certification of "May Carry" Signals*: At paragraph 64 of the *Report and Order* we stated that:

> [W]e do not envision certificating new systems, or the addition of new signals whose carriage is not mandatory to existing systems, if the activated channel capability available for the provision of access services is insufficient to provide at least one full channel for access programming
>
> We will, however, certificate new systems or "may carry" signals upon assurance by the applicant cable operator that at least one channel will be reserved full time, for access purposes. In other words, "may carry" signals may be certified beyond the system's activated channel capability if assurance is given that the signals will share channel space with each other to the extent necessary to preserve the one full time access channel. We have amended Section 76.254 (b) of the Rules to make it clear, in conformity with the paragraph quoted above, that at least one channel must be reserved full time for the exclusive presentation of access programming except in the case of systems operating on June 21, 1976 and having insufficient channel capability. See attached Appendix.

(b) *Previously Certified Access Programs*: Implementation of previously certified access programs now exceeding our rules may continue only upon an appropriate showing and Commission approval unless such a showing was made and accepted under the prior rules. Beginning at paragraph 97 of the *Report* [406] *and Order* we outline our treatment of locally imposed access requirements concluding that "in the absence of such showings, provisions exceeding our own will be considered to have no force or effect . . ." and "in those situations where such showings were made and accepted under prior rules, they need not be repeated and our rulings thereon will continue in effect."

(c) *"Blackout" Time*: Provision has been made for the use of "blackout" time to accommodate access programming on those cable systems without sufficient activated channel capability. Use of "blackout" time was granted in lieu of forcing the operator to rebuild or install converters. Therefore, we expect a maximum effort to make this time

available. For instance, an assertion that "blackout" time does not exist because of dual channel carriage of network programming is an unacceptable excuse for denial of time to a potential access user.

(d) *Availability of Access Time and Charges for Access Presentations*:

(1) A number of questions have arisen as to the conditions under which access channel time must be made available and as to the procedures for resolving disputes concerning the availability of access channel time. As to the latter question the access channel rules adopted by the cable television system operator provide the basic mechanism for regulating channel usage. We have not included, beyond the specifications contained in Section 76.256 of the Rules, every detail of what these rules should contain, leaving cable operators some leeway to experiment with the details of the rules and to accommodate them, in a reasonable fashion, to local conditions. Questions as to the reasonableness of particular sets of rules should be referred to the Commission for resolution. Every effort will be made to resolve these questions on an informal basis, but more formal proceedings will be commenced if necessary.

(2) Among the matters left initially to the operator's discretion in the rules adopted are the hours during which production facilities and channels are to be available for use. Some questions have been asked as to whether it is adequate to simply have access channels and equipment available during normal business hours (9 a.m. to 5 p.m., for example). In the ordinary circumstances we would not consider such a limitation to be within the intent of the rules, in view of the predominance of television viewing during the evening (prime time) hours. Access limited to day time hours only would thus not be access to the most significant block of viewing audience. We do not, however, require that the equipment and channels be available twenty-four hours a day, seven days a week.

(3) Charges for production equipment use should also be spelled out in the appropriate access channel rules. As we indicated in the *Report and Order*, except for a free five [407] minutes of live time, charges may be made not only for the equipment used but also for any system personnel involved in the program production effort. Such charges should be "reasonable and consistent with the goal of affording users a low-cost means of television access." Section 76.256(c)(3). In permitting charges for production time, however, we did not intend to include charges for the playing of tapes or film provided by public access

channel users when no use of system production equipment is involved and the programming presented is in a format compatible with that of the system. That is, it should be possible for a public access channel user who has produced a program on his own to deliver that program to the system and have it played without additional charge.

(e) *Operating Rules*:

(1) We remind all cable operators that rules governing public, educational, and leased access programming are required to be filed with the Commission within 90 days after a system first activates any such channel, and also are to be made available for public inspection. See Section 76.256(d)(4). This requirement is not new, and we will expect full compliance henceforth. Also, because more than one local government may be sharing use of the government access channel, we urge that each cable operator include in his operating rules a provision assuring channel availability for use by each local government jurisdiction served by the cable system.

(2) We note the omission of an exception contained in former Section 76.251(a)(11)(iv) of the Rules for some pre-1972 cable systems. The oversight was inadvertent and we are restoring it as part of Section 76.256(d)(4). See Appendix.

In view of the foregoing, a denial of the reconsideration requests and issuance of the clarification would be in the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by the Community Communications Project of New Paltz, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Joint Petition for Partial Reconsideration" filed by Coachella Valley Television; Colony Communications, Inc.; Complete Channel TV, Inc.; Cox Cable Communications, Inc.; Gulf Coast Television, Inc.; Sammons Communications, Inc.; Sioux Falls Cable Television; Televents Affiliated Systems; and the TM Communications Company, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed by the National Cable Television Association and the California Cable Television Association, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed by Paul J. Fox, Susan C. Greene, Harold E. Horn, Shelia Mahony, and Victor Nicholson, staff members of the Cable Television Information Center of the Urban Institute, IS DENIED.

[408] IT IS FURTHER ORDERED, That Part 76 of the Commission's Rules and Regulations IS AMENDED, effective January 28, 1977, as set forth in the Appendix attached.

Authority for the amendments to the rules adopted in the Appendix attached hereto is contained in Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, 309, 315

and 317 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. Section 76.254(b) is revised to read as follows:

§ 76.254 Number and designation of access channels.

* * * *

(b) Until such time as there is demand for each channel full time for its designated use, public, educational, government, and leased access channel programming may be combined on one or more cable channels. To the extent time is available therefor, access channels may also be used for other broadcast and nonbroadcast services except that at least one channel shall be maintained exclusively for the presentation of access programming as required by paragraph (c) of this Section.

* * * *

2. Section 76.256(d)(4) is revised to read as follows:

§ 76.256 Access Services.

* * * *

The operating rules governing public, educational, and leased access programming shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection as provided in § 76.305(b). Except the Commission authorization, or with respect to local government access programming, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels; however, franchise specifications concerning the number of such channels for systems in operation prior to March 31, 1972 shall continue in effect.

* * * *

CONCURRING STATEMENT OF COMMISSIONER MARGITA E. WHITE IN WHICH COMMISSIONER JOSEPH R. FOGARTY JOINS

Four years ago the Commission decided to require all cable systems in major television markets to have a 20-channel capacity by March 31, 1977, in order to permit certain types of access programming. (See Section 76.251 of the Rules.)

Earlier this year, however, the Commission concluded that the benefits of the nationwide Federal access requirement were outweighed by the costs incurred in order to provide the access. *Cable TV Capacity and Access Requirements,* 59 FCC 2d 294, 313 (1976). Thus, where "community boundaries [did] not correspond to the technical and economic

realities of cable television construction," the Commission amended its rules to apply access requirements on a head-end basis. 59 FCC 2d at 302. Where the system was deemed too small to bear the burdens of providing access services (i.e. less than 3500 subscribers), the system was exempted. 59 FCC 2d at 303. For all systems, the deadline for implementing reduced requirements was changed from March 31, 1977 to June 21, 1986. Section 76.252 of the Rules, 50 FCC 2d at 327.

In reaching its decision to reduce or eliminate certain access requirements, the Commission decided that the cost of converters necessary [409] to provide access channels should not be imposed upon all subscribers. The Commission, however, went beyond simply reducing an onerous requirement imposed on all systems by a distant Federal government. It has, in essence, preempted local authority to negotiate and agree upon franchise terms, based on local need and experience, which call for access channels in excess of the minimal Federal standard. Section 76.258; 59 FCC 2d at 324-25. Absent Commission permission by waiver of Section 76.258, franchise provisions exceeding the Commission's minimum "will be considered to have no force or effect." 59 FCC 2d at 324-25.[1]

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[1] The Commission defers to "voluntary actions" taken by cable operators. But because Section 76.258 of the Rules remains unchanged, even a commitment by the cable operator "made in a genuinely voluntary atmosphere" during franchise negotiations would remain null and void without a waiver by the Commission. Thus, the city would have no way to enforce a promise made by the cable operator upon which the local government relied when granting the franchise. Moreover, the waiver process is cumbersome, time-consuming and adds uncertainty in the negotiation process.

I generally support, as reasonable, the Commission's decision to reduce the Federally mandated access requirement. However, I have reservations as to the wisdom of federal preemption of local government decisions to add access requirements which go beyond those required by the Commission.[2]

While the minimum access standards called for by the Commission are reasonable, I question whether it is appropriate for the Commission to deny local governments the right to negotiate and agree upon franchise terms, based on local needs and a local determination of policy, which call for access channels in excess of the Federal standards. Where a city has made a determination through the political process that there is good reason to exceed those standards and the cable operator has freely agreed to accept a franchise including subscriber rates which contemplate that capacity, I do not believe the city should be required to ask the Federal government's leave to include such terms in the franchise.

The Commission's basis for preemption is a "belief" that local authorities will dictate "excessive burdens" and create "an undue strain on system operators and cable subscribers." (Para. 8) However,

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[2] Aside from the wisdom of this action, there are doubts as to the extent of permissible Commission preemption of state and local authority absent statutory authorization. See *NARUC* v. *FCC*, —— U.S. App. D.C. ——, 533 F.2d 601 (1976).

while the Commission amply substantiated the need to reduce the Federally mandated access requirement, no similar justification is provided for preventing local governments from fully exercising their franchise authority. The absence of evidence of excessive burdens being imposed on many cable operators confirms my view that the issue can be resolved best through the free marketplace and the democratic process. The system operator has the option of refusing unreasonable demands and the subscriber—as the affected consumer—has the opportunity to interface directly with his locally elected officials.

The American people are expressing growing concerns over their inability to impact upon a remote Federal government in Washington and are asking for a greater voice in government decisions affecting them. The basic question here is which jurisdiction can be most respon- [410] sive to the public interest. In my view, it is the government closest and most accessible to the people.

Moreover, the Commission itself, as part of its reregulation process, is considering eliminating Federal supervision of local franchises. Hence, it seems especially questionable at this time for the Commission to entrench its role in the local franchise negotiating process.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

No. 76-1496

MIDWEST VIDEO CORPORATION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS,

COLDWATER CABLEVISION, INCORPORATED, MICHIGAN CA-TV COMPANY, AMERICAN BROADCASTING COMPANIES, INC. and BILL CABLE, INC. and WESTERN COMMUNICATIONS, INC., INTERVENOR-RESPONDENTS.

No. 76-1839

AMERICAN CIVIL LIBERTIES UNION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS.

AMERICAN BROADCASTING CO., INC., GILL CABLE, INC. and WESTERN COMMUNICATIONS, INC., CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA, et al., COLDWATER CABLEVISION, INC., MICHIGAN CA-TV COMPANY, MIDWEST VIDEO CORPORATION, INTERVENORS.

Petition for review of order of the
Federal Communications Commission

On motion of Federal Communications Commission, it is now here ordered that the issuance of the mandate herein in these causes, be and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 4, 1978

APPENDIX E

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

* * * *

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the

licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

* * * *

§ 153. Definitions

* * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * *

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention

insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * *

§ 307. Licenses; allocation of facilities; terms; renewals

* * * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * *

APPENDIX F

§ 76.251 *Minimum channel capacity; access channels.*

(a) No cable television system operating in a community located in whole or in part within a major television market, as defined in § 76.5, shall carry the signal of any television broadcast station unless the system also complies with the following requirements concerning the availability and administration of access channels:

(1) *Minimum channel capacity.* Each such system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered;

(2) *Equivalent amount of bandwidth.* For each Class I cable channel that is utilized, such system shall be capable of providing an additional channel, 6 MHz in width, suitable for transmission of Class II or Class III signals (see § 76.5 for cable channel definitions);

(3) *Two-way communications.* Each such system shall maintain a plant having technical capacity for nonvoice return communications;

(4) *Public access channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at

least the minimal equipment and facilities necessary for the production of programming for such a channel. See also § 76.201;

(5) *Education access channel.* Each such system shall maintain at least one specially designated channel for use by local educational authorities;

(6) *Local government access channel.* Each such system shall maintain at least one specially designated channel for local government uses;

(7) *Leased access channels.* Having satisfied the origination cablecasting requirements of § 76.201, and the requirements of paragraph (a)(4), (a)(5) and (a)(6) of this section for specially designated access channels, such system shall offer other portions of its nonbroadcast bandwidth, including unused portions of the specially designated channels, for leased access services. However, these leased channel operations shall be undertaken with the express understanding that they are subject to displacement if there is a demand to use the channels for their specially designated purposes. On at least one of the leased channels, priority shall be given part-time users;

(8) *Expansion of access channel capacity.* Whenever all of the channels described in paragraphs (a)(4) through (a)(7) are in use during 80 percent of the weekdays (Monday-Friday) for 80 percent of the time during any consecutive three-hour period for six consecutive weeks, such system shall have six months in which to make a new

channel available for any or all of the above-described purposes;

(9) *Program content control.* Each such system shall exercise no control over program content on any of the channels described in paragraphs (a)(4) through (a)(7) of this section; however, this limitation shall not prevent it from taking appropriate steps to insure compliance with the operating rules described in paragraph (a)(11);

(10) *Assessment of costs.* (i) From the commencement of cable television service in the community of such system until five (5) years after completion of the system's basic trunk line, the channels described in paragraphs (a)(5) and (a)(6) of this section shall be made available without charge.

(ii) One of the public access channels described in paragraph (a)(4) of this section shall always be made available without charge, except that production costs may be assessed for live studio presentations exceeding five minutes. Such production costs and any fees for use of other public access channels shall be consistent with the goal of affording to public a low-cost means of television access;

(11) *Operating rules.* (i) For the public access channel(s), such system shall establish rules requiring first-come nondiscriminatory access; prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lot-

tery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

(ii) For the educational access channel(s) such system shall establish rules prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

(iii) For the leased channel(s), such system shall establish rules requiring first-come, non-discriminatory access; prohibiting the presentation of lottery information and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); requiring sponsorship identification (see § 76.221); specifying an appropriate rate schedule; and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting time. Such a record shall be retained for a period of two years.

(iv) The operating rules governing public access, educational, and leased channels shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection at the system's offices. Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels; however, franchise specifications concerning the number of such channels for systems in operation prior to March 31, 1972 shall continue in effect.

(b) No cable television system operating in a community located wholly outside of all major television markets shall be required by a local entity to exceed the provisions concerning the availability and administration of access channels contained in paragraph (a). If a system provides any access programming, it shall comply with paragraph (a)(9), (a)(10), and (a)(11).

(c) The provisions of this section shall apply to all cable television systems that commence operations on or after March 31, 1972, in a community located in whole or in part within a major television market. Systems that commenced operations prior to March 31, 1972, shall comply on or before March 31, 1977: *Provided, however*, That, if such systems begin to provide any of the access services described above at an earlier date, they shall comply with paragraph (a)(9), (10), and (11) of this section at that

time; *And provided, further*, That if such systems receive certificates of compliance to add television signals to their operations at an earlier date, pursuant to § 76.61(b) or (c), or § 76.63 (a) (as it relates to § 76.61(b) or (c)), for each such signal added, such systems shall provide one (1) access channel in the following order of priority—(1) public access, (2) education access, (3) local government access, and (4) leased access—and shall comply with the appropriate requirements of paragraphs (a)(4)-(7) and (a)(9)-(11) of this section with respect thereto.

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